TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 392

UNITED STATES, PETITIONER

vs.

GEORGE E. SHIMER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 6, 1960
GRANTED NOVEMBER 14, 1960

Supreme Court of the United States

OCTOBER TERM, 1960

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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[fol. 1] **IN THE**
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 23909

UNITED STATES OF AMERICA

v.

GEORGE E. SHIMER

1. DOCKET ENTRIES

1/10/58 Complaint filed.
1/10/58 Summons exit.
1/28/58 Summons returned "on 1/20/58 served" and filed.
2/10/58 Stipulation and Order extending time for filing Answer filed. Noted 2/10/58.
2/21/58 Answer filed.
8/14/58 Plaintiff's Motion for judgment on the pleadings filed.
11/3/58 Argued sur Motion for judgment on the pleadings.
12/7/58 Opinion and Order, Welsh, J., denying plaintiff's Motion for judgment in the pleadings filed.
12/8/58 Note and notice mailed.
4/9/59 Defendant's Motion for summary judgment filed.
4/13/59 Stipulation of facts filed.
5/20/59 Argued sur defendant's Motion for summary judgment.
6/24/59 Order granting defendant's Motion for summary judgment.
6/24/59 Judgment in favor of defendant, and against plaintiff filed.
6/26/59 Note and notice mailed.
8/13/59 Notice of appeal by plaintiff filed—copy to Edward Davis, Esq. on 8/14/59.

[fol. 2] 8/13/59 Copy of Clerk's notice to United States Court of Appeals filed.

9/22/59 Motion for and Order extending time for filing and docketing appeal for 90 days from 8/13/59 filed.

9/23/59 Noted.

11/8/59 Record transmitted to the United States Court of Appeals.

[fol. 3] IN UNITED STATES DISTRICT COURT

COMPLAINT—Filed Jan. 10, 1958

The plaintiff, the United States of America, by HAROLD K. WOOD, United States Attorney for the Eastern District of Pennsylvania, and JOHN A. ERICKSON, Assistant United States Attorney for the said district, complains of the defendant, George E. Shimer, and for cause of action alleges and says:

FIRST COUNT

1. The plaintiff being the United States of America, the Court has jurisdiction of this action pursuant to 28 U.S.C., 1345.

2. The defendant resides at Philadelphia, in the Eastern District of Pennsylvania, within the jurisdiction of this Court.

3. The defendant, on or about the 12th day of January, 1948, procured a loan from the Excelsior Saving Fund and Loan Association, 33 West Main Street, Norristown, Pennsylvania, in the principal sum of $13,000.00, with interest at the rate of 4% per annum, payable at the rate of $78.78 monthly. Upon defendant's application, said loan was guaranteed to the extent of $4,000.00 by the Administrator of Veterans Affairs, pursuant to Section 500, Title III of the Servicemen's Readjustment Act of 1944, as amended, 59 Stat. 626 (38 U.S.C. 694).

4. The defendant defaulted in the payments of the monthly installments due on the said loan and, in accordance with the provisions of Section 506 of the cited Act (38 U.S.C. 694g), the Veterans Administration, on October 12, 1949, paid the Excelsior Saving Fund and Loan Association, the holder of the obligation, the sum of $4,000.00.

5. Upon payment of the sum aforesaid the plaintiff became subrogated to the rights of the holder to the extent of such payment.

6. Under Veterans Administration regulations (38 CFR 36.4323(e)), issued pursuant to Section 504 of the cited Act (38 U.S.C. 694d), defendant is liable for the amount so paid, which amount, less subsistence allowance

[fol. 4] set off, plus interest, results in his indebtedness to the United States as follows:

	Interest	Principal
Amount paid October 12, 1949, to the Excelsior Saving Fund and Loan Association, on D. O. Voucher No. 85590, accounts of P. J. Carney, symbol 403		$4,000.00
Interest through November 30, 1949, as computed by Veterans Administration	$ 23.56	
Interest from 12/1/49 to 6/30/50	92.89	
Less subsistence allowance 5/1/50 to 6/2/50, at $30.00 per month set off		32.00
		3,968.00
Plus interest at 4% per annum on $3,968.00 from 6/30/50 to 7/31/56	965.55	
Plus interest at 4% per annum on $3,968.00 from 7/31/56 to 10/15/57	191.79	
Total interest as of 10/15/57		1,273.79
Amount due as of 10/15/57		$5,241.79

Interest continues to accrue at the rate of 4% per annum on the unpaid principal balance of $3,968.00 from October 15, 1957, until paid.

7. Demand has been made upon the defendant for payment of the indebtedness and no part of the said sum has been paid.

SECOND COUNT

1. The plaintiff incorporates by reference in this Count the allegations of paragraph 1 to 5 inclusive of the First Count set forth above.

2. The defendant, George E. Shimer, is under legal obligation to reimburse the plaintiff, the United States of America, in the amount of $3,968.00, with interest at the rate of 4% per annum an the principal sum of $4,000.00 from the 12th day of October, 1949, until the 30th day of June, 1950, and interest at the rate of 4% per annum on the principal sum of $3,968.00 from the 30th day of June, 1950, until paid, under the provisions of the Servicemen's Readjustment Act of 1944, as amended, 38 U.S.C. 694, et seq., and Veterans Administration Regulation 36.4323

(e), promulgated under the authority of Section 694d of the said Act.

[fol. 5] WHEREFORE, plaintiff prays:

1. That, as holder of the note, the plaintiff have and recover of and from the defendant, George E. Shimer, under the First Count of its Complaint, the amount of $3,968.00 with interest on the principal sum of $4,000.00 at the rate of 4% per annum from the 12th day of October, 1949, until the 30th day of June, 1950, and interest at the rate of 4% per annum on the principal sum of $3,968.00 from the 30th day of June, 1950, until paid; that its costs in this action be assessed against the defendant, and that the plaintiff be granted all other relief to which it may be entitled.

2. In the alternative, that judgment be entered in favor of the plaintiff against the defendant, George E. Shimer, under the Second Count of its Complaint, for the sum of $3,968.00, with interest at the rate of 4% per annum on the principal sum of $4,000.00 from the 12th day of October, 1949, until the 30th day of June, 1950, and interest at the rate of 4% per annum on the principal sum of $3,968.00 from the 30th day of June, 1950, until paid; that its costs in this action be assessed against the said defendant, and that the plaintiff be granted all other relief to which it may be entitled.

Dated this 9th day of January, 1958.

UNITED STATES OF AMERICA,

By: /s/ HAROLD K. WOOD,
United States Attorney.

/s/ JOHN A. ERICKSON,
Assistant United States Attorney.

[fol. 6] IN UNITED STATES DISTRICT COURT

ANSWER—Filed Feb. 21, 1958

FIRST COUNT

FIRST DEFENSE:

The plaintiff's Complaint fails to state a cause of action upon which relief can be granted.

SECOND DEFENSE:

The defendant herein admits the averments of paragraphs 1, 2, 3 and 7 of the First Count of the Complaint.

THIRD DEFENSE:

The defendant denies that the Veterans Administration, on October 12, 1949, paid the Excelsior Saving Fund and Loan Association, in accordance with the provisions of Section 506 of the Servicemen's Readjustment Act of 1944, as amended, and that they became subrogated to the rights of the holder to the extent of such payment and that such payments resulted in any indebtedness on the part of the defendant to the United States. On the contrary defendant avers that the Veterans Administration paid the Excelsior Saving and Loan Association when no obligation existed on the part of the defendant or the Veterans Administration to make such payments. The mortgage premises was repurchased by the mortgagee without the mortgagee filing a petition under the Deficiency Judgment Act of the Commonwealth of Pennsylvania, Act of July 16, 1941, 12 PS, Section 2621.1 et seq

SECOND COUNT

FOURTH DEFENSE:

Defendant incorporates herein all the defenses asserted to the First Count and in addition thereto, avers that under the provisions of the Veterans Administration Regulations 36.4323 E there is no liability on the part of

either the defendant or the Veterans Administration as [fol. 7] long as the mortgagee has failed to comply with the Deficiency Judgment Act cited above.

WHEREFORE, the defendant herein prays that judgment be entered in his favor.

/s/ EDWARD DAVIS,
Attorney for Defendant.

[fol. 8] IN UNITED STATES DISTRICT COURT

4. MOTION OF PLAINTIFF FOR JUDGMENT ON THE PLEADINGS
Filed Aug. 14, 1958

Plaintiff moves the Court to enter judgment on the pleadings in favor of the plaintiff, pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, for the reason that the defendant in his answer has failed to state a defense against the claim of the plaintiff.

/s/ HAROLD K. WOOD,
United States Attorney.

/s/ DANIEL J. DIGIACOMO,
Assistant United States Attorney.

Dated: August 12, 1958.

[fol. 9] IN UNITED STATES
DISTRICT COURT

OPINION AND ORDER—December 17, 1958

WELSH, J.

The within complaint discloses the following facts:

On or about January 12, 1948, the defendant, George E. Shuner, procured a loan from the Excelsior Saving Fund and Loan Association, 33 West Main Street, Norristown, Pennsylvania, in the principal sum of $13,000.00, with interest at the rate of 4% per annum, payable at the rate of $78.78 monthly. Upon defendant's application, said loan was guaranteed to the extent of $4,000.00, by the Administrator of Veterans Affairs, pursuant to Section 500, Title III of the Servicemen's Readjustment Act of 1944, as amended, 59 Stat. 626 (38 U. S. C. 694). The defendant defaulted in the payments of the monthly installments due on the said loan, and the Administrator, on October 12, 1949, paid the Excelsior Saving Fund and Loan Association, the holder of the obligation, the sum of $4,000.00.

The complaint alleges that plaintiff paid the sum in accordance with the provisions of Section 506 of the Act (38 U. S. C. 694g) and alleges further that it is entitled to recover said sum (less subsistence allowance set off, plus interest) by virtue of its right of subrogation or indemnity under Veterans Administration Regulations (38 C. F. R. 36.4323(e)), issued pursuant to Section 504 of the Act (38 U. S. C. 694d).

In his answer defendant denies that the Administrator, on October 12, 1949, paid the Excelsior Saving Fund and Loan Association, in accordance with the provisions of Section 506 of the Servicemen's Readjustment Act of 1944, as amended, and that he became subrogated to the rights of the holder to the extent of such payment and that such payment resulted in any indebtedness on the part of the defendant to the United States. On the contrary, defendant avers that the Administrator paid the Excelsior Saving Fund and Loan Association when no obligation existed on the part of the defendant or the

[fol. 10] Administrator to make such payment. Defendant further avers that the mortgaged property was repurchased by the mortgagee, said mortgagee not having filed a petition to fix the fair market value of the property within six months of the sale, as required by the Deficiency Judgment Act of the Commonwealth of Pennsylvania, Act of July 16, 1941, 12 P. S. Section 2621.1 et seq.

Plaintiff has moved for judgment on the pleadings in favor of the plaintiff, pursuant to Rule 12 (c) of the Federal Rules of Civil Procedure, 28 U. S. C. 723c et seq., for the reason that the defendant in his answer has failed to allege a valid defense against the claim of the plaintiff.

1. The pertinent provisions of the Deficiency Judgment Act are as follows:

> "2621.1 Whenever any real property has heretofore been or is hereafter sold, directly or indirectly, to the plaintiff in execution proceedings and the price for which such property has been sold was or is not sufficient to satisfy the amount of the judgment, interest and costs and the plaintiff seeks to collect the balance due on said judgment, interest and costs, the plaintiff or plaintiffs shall petition the court having jurisdiction to fix the fair market value of the real property sold as aforesaid. . . .
>
> 2621.6 . . . After hearing and the determination by the court of the fair market value of the property sold the debtor, obligor, guarantor and any other person liable directly or indirectly to the plaintiff or plaintiffs for the payment of the debt shall be released and discharged of such liability to the plaintiff to the extent of the fair market value of said property as previously agreed to by the plaintiff or plaintiffs or determined by the court, . . . and thereupon petitioner may proceed by appropriate proceedings to collect the balance of the debt.
>
> 2621.7 The plaintiff or plaintiffs shall file all petitions in accordance with section one and section two

[fol. 11] of this act not later than six months after the sale of any real property: . . . In the event no petition is filed within such period, the debtor, obligor, guarantor and any other person liable directly or indirectly to the plaintiff or plaintiffs for the payment of the debt shall be released and discharged of such liability to the plaintiff or plaintiffs."

2. To paraphrase the foregoing provisions of the Act it may be stated: (a) the aim of the Act is to protect debtors, obligors or guarantors by requiring a mortgagee, after a sale has resulted in a deficiency, to petition the court having jurisdiction to fix the fair market value of the real property sold and thereafter by limiting said mortgagee's right of collection to the balance of the debt in excess of the fair market value of the property; (b) to further protect debtors, obligors or guarantors, the Act discharges and releases them of liability to the mortgagee in the event said mortgagee fails to file a petition within six months.

3. If the cited Act is applicable in the instant case neither the defendant debtor nor the Administrator guarantor is liable to the mortgagee bank because of the bank's failure to petition for the fair market value of the property within six months of the sale as required by the Act. Needless to say, had the guarantor here been a private party instead of a public official the Act would clearly have been applicable.

Plaintiff's contention is that the Act is inapplicable because (a) its claim is based directly upon a federal statute and regulation and therefore its right of recovery cannot in any event be impaired by operation of state law and (b) this suit is not for a deficiency judgment, but for recovery under an independent contract of indemnity. United States v. Henderson, 121 F. Supp. 343, United States v. Gallardo, 154 F. Supp. 373, United States v. Jones, 155 F. Supp. 52 and McKnight v. United States, decided September 22, 1958, by the United States Court of Appeals for the Ninth Circuit.

We think that the contention is not persuasive under the circumstances of this case.

[fol. 12] 4. The Act does not impair the federal legislation guaranteeing loans such as that obtained by the defendant veteran here. The purpose of the federal legislation is to aid veterans in procuring home loans. The operation of the Pennsylvania Act does nothing to defeat that purpose. It does not prevent the bank from collecting any deficiency as does the California Act which was involved in McKnight v. United States, supra; it merely limits the mortgagee bank's right of recovery to the sum in excess of the fair market value of the property. We fail to perceive how such circumstances could defeat the purpose of the federal legislation or the rights of the mortgagee bank.

5. The independent contract of indemnity could have formed a legally sound basis for plaintiff's right to recover here had the Administrator made payment to the mortgagee bank when the defendant was under a legal obligation to the mortgagee bank. However, as it has been shown already, liability of the defendant to the mortgagee bank, if any, does not attach unless and until the mortgagee bank within six months of the sale of the property files a petition to fix the fair market value of the property. Since said bank did not file such petition no liability attached to the defendant mortgagor and no liability attached to the Administrator guarantor. His payment to the bank under such circumstances was improper.

Finally, the Administrator's own regulation, 38 C. F. R. 36.4323 (e), recognizes that only amounts he pays "on account of the liabilities" of a veteran constitute a debt owing to the United States by such veteran. Said regulation provides:

> "Any amounts paid by the Administrator on account of the liabilities of any veteran guaranteed or insured under the provisions of the act shall constitute a debt owing to the United States by such veteran."

6. We hold, therefore, that the Pennsylvania Deficiency Judgment Act is applicable in the instant case, and that alleging that the mortgagee bank failed to comply with [fol. 13] the provisions thereof is a valid defense to this suit. Plaintiff's motion for judgment under Rule 12c will accordingly be DENIED.

AND NOW, to wit, this 17th day of December, A. D., 1958, in accordance with the preceding opinion, it is ORDERED, ADJUDGE AND DECREED that plaintiff's motion for judgment under Rule 12c be and the same is hereby DENIED.

/s/ WELSH, J.

[fol. 14] IN UNITED STATES DISTRICT COURT

MOTION OF DEFENDANT FOR SUMMARY JUDGMENT

Filed April 9, 1959

NOW COMES the Defendant, GEORGE E. SHIMER, by his attorney, EDWARD DAVIS, ESQUIRE, and moves this Honorable Court for summary judgment in his favor as provided by and under Rule 56-B of the Federal Rules of Civil Procedure on the ground that there is no genuine triable issue as to any material fact and that in view of the Opinion and Order of the HONORABLE GEORGE A. WELSH, dated December 17, 1958, denying Plaintiff's Motion for Judgment under Rule 12-DC, the Defendant is entitled to judgment herein.

/s/ EDWARD DAVIS,
Attorney for Defendant.

Dated April 8, 1959.

[fol. 15] IN UNITED STATES DISTRICT COURT

STIPULATION OF FACTS—Filed April 13, 1959

AND NOW, to wit: this 13th day of April, 1959, it is hereby Stipulated and Agreed by and between counsel for plaintiff, HAROLD K. WOOD, United States Attorney in and for the Eastern District of Pennsylvania, and DANIEL J. DiGIACOMO, Assistant United States Attorney for said District, and counsel for defendant, EDWARD DAVIS, Esquire, and SHELDON TABB, Esquire, that the following are admitted facts:

1. On January 12, 1948, the defendant, George E. Shimer, obtained a loan of $13,000.00 from the Excelsior Saving Fund and Loan Association to purchase residential realty situate in Whitemarsh Township, Montgomery County, Pennsylvania.

2. The loan was to be repaid with interest at 4% per annum in monthly installments of $78.78 over a term of twenty years, as evidenced by a bond and secured by a mortgage on the property purchased, executed by George E. Shimer and Mildren F. Shimer, his wife, to the Excelsior Saving Fund and Loan Association, on the same date.

3. On February 6, 1948, George E. Shimer, the defendant, an eligible veteran, applied to the Administrator of Veterans Affairs for guaranty of said loan pursuant to the provisions of Title III of the Servicemen's Readjustment Act of 1944 as amended, on VA Form 4-1820, Home Loan Report", a photostatic copy of which is attached hereto and marked Exhibit A.

4. The Veterans Administration approved the Home Loan Report and the application for guaranty, and on February 11, 1948 issued VA Form 4-1899 "Loan Guaranty Certificate", guaranteeing "Subject to the Servicemen's Readjustment Act of 1944, as amended, Public Law 268, 79th Congress, and the regulations issued thereunder to the date of this certificate, 37.38 percent of the indebtedness outstanding from time to time under the loan

identified above", which for the $13,000.00 loan was $4,000.00.

5. Shimer defaulted on May 12, 1948, continued in default, and on April 12, 1949, the Excelsior Saving Fund [fol. 16] and Loan Association filed "Notice of Intention to Foreclose" with the Veterans Administration, and thereafter on May 12, 1949 entered judgment in the Court of Common Pleas of Montgomery County, Pennsylvania, against George E. Shimer and Mildred F. Shimer, his wife, to No. 351 April Term 1949, to foreclose the mortgage on the property purchased with the loan.

6. At the Sheriff's sale, June 29, 1949, the property was purchased by the Excelsior Saving Fund and Loan Association for a bid of $250.00.

7. On July 8, 1949, the Excelsior Saving Fund and Loan Association filed a claim with the Administrator of Veterans Affairs for payment of the loan guaranty—$4,000.00. The Administrator of Veterans Affairs paid this amount to the Association October 7, 1949.

8. The Excelsior Saving Fund and Loan Association sold the aforementioned property on September 8, 1949 to William D. and Jeanne E. Bjorestek for $10,500.00.

9. The Excelsior Saving Fund and Loan Association did not comply with the provisions of the Deficiency Judgment Act of the Commonwealth of Pennsylvania, Act of 1941, July 16, P.L. 400, Section 1, 12 Purdons, Section 2621.1, etc.

/s/ HAROLD K. WOOD,
United States Attorney.

/s/ DANIEL J. DIGIACOMO,
Assistant United States Attorney.
Counsel for Plaintiff.

/s/ EDWARD DAVIS, Esquire,

/s/ SHELDON TABB, Esquire,
Counsel for Defendant.

(Here follow 2 charts, Home Loan Report)

HOME LOAN REPORT

☒ ORIGINAL — PHOTO CONFIRMATION

TO VETERANS ADMINISTRATION (Attn. Loan Guar. Div.)

To be used only by supervised lending institutions for reporting a loan made or to be made for guaranty or insurance. Make out in duplicate, original to be forwarded to the Veterans Administration Loan Guaranty Div., duplicate to be retained by lender. DO NOT USE TO REPORT A FARM OR BUSINESS LOAN

VA LOAN NO.

I. H

☐ Guarantee ☐ Insurance DATE

This statement of the undersigned lender is made pursuant to section 500 of title III of the Servicemen's Readjustment Act of 1944, as amended, Public Law No. 346, 78th Congress, and there is transmitted herewith:

(Check only the applicable forms or papers being forwarded in accordance with procedure for the type of loan being reported)

☐ Original honorable discharge ☐ Escrow or other agreement ☐ Other (Specify)

☐ Other original separation papers ☒ Appraisal report VA Form 1805

☒ Certificate of eligibility VA Form 1870 ☐ Note or other evidence of indebtedness

VETERAN'S NAME (Last, first, middle name)

Shimer, George E.

SERIAL NO.

33 982 184

☒ Army ☐ M C ☐ Navy ☐ C G

FOR VA USE

ADDRESS

Righter Street, Conshohocken, Pa.

DATE OF BIRTH

May 30, 1915

AMOUNT AND TERMS OF LOAN

AMT. OF LOAN

13,000.

DATED

1-12-48

PAYABLE

$ 78.78

PER

month

FOR (No. of)

20 yrs.

MOD.

INCL. INT. AT

4 % per annum

☒ Term loan

PAYABLE (No. of)

20 yrs.

% PER ANNUM

4

INTEREST PAYABLE

monthly

☐ Secured ☐ Unsecured

BY MORTGAGE ☐ 1st ☐ 2d ☐ 1st chattel

If note is payable under terms other than provided for above, attach supplemental statement

If lien is other than provided for above, explain

DESCRIPTION OF PRIMARY LIEN

If the above loan is made pursuant to section 505 "A" or for repairs, alterations and improvements subject to a primary loan, fill in the following:

HELD OR MADE BY

ADDRESS

AMOUNT

INTEREST

% per annum

TYPE

FOR

YRS

MOS

PAYABLE

INSTALLMENTS

PER

$

NO. AMORT'N OF ANY SUPERIOR MORTGAGE OR CHARGE HELD BY HOLDER OF THIS LOAN

LOCATION AND LEGAL DESCRIPTION OF PROPERTY

LOCATION OF THE REAL PROPERTY TO SECURE THE LOAN

Righter Street, Conshohocken, Montgomery County, Pa.

LEGAL DESCRIPTION OF REAL PROPERTY AS IT APPEARS IN THE MORTGAGE OR OTHER INSTRUMENT SECURING THE LOAN

BEGINNING at a point on the northwesterly side of Righter Street at the distance of sixty four and two hundredths feet southwesterly from the southwesterly side of Thirteenth Avenue, being a corner of Lot No. 361 on said plan; thence extending along said northwesterly side of said Righter Street, southwestwardly one hundred feet to a corner of lot No. 358 on said plan; thence extending along said lot No. 358, northwestwardly one hundred feet to a corner of land known as Leeland Park; thence extending along said land northeastwardly one hundred feet to a point a corner of Lot No. 361, aforesaid; thence extending along said Lot No. 361, southeastwardly one hundred feet to the first mentioned point and place of beginning.

RECEIVED

FEB 9 1948

FOR REAL ESTATE LOAN THE VETERAN'S ESTATE IN THE SUBJECT PROPERTY IS AS FOLLOWS (Refer to section 700 of the Regulations)

In fee simple

PURPOSE OF LOAN

THE LOAN WAS ☐ WILL BE MADE PURSUANT TO SECTION 501 FOR THE FOLLOWING PURPOSES for a home.

(If loan is closed pursuant to section 507 for refinancing delinquent indebtedness this report must be supplemented with Form ... Report Delinquent Indebtedness)

Regulations issued under the act, and in effect on the date of any loan which is submitted and accepted or approved for a guaranty or for insurance thereof, govern the rights, duties and liabilities of the parties to such loan and any provisions of the loan instruments inconsistent with such regulations are hereby deemed to be modified thereto. (Section 4(h) of the Regulations)

VA Form 1800

CERTIFICATION

The Undersigned Lender Certifies

(1) The proceeds of such loan (will be) (has been) used for payment of the property purchased or constructed or [illegible] as follows:

DISBURSEMENTS		
1 Seller or contractor	$ 2159.24	$
2 Existing liens	10633.00	
3 Total Cost (1 plus 2)		$ 12792.24
4 Taxes 1946 1947	29.76	
5 Fire insurance, premium 5 yrs. $21000.	147.00	
Amount $		
6 Other insurance, premium	none	
Amount $		
7 Fees Appraisal	15.00	
8 Inspection	none	
9 Misc. [illegible]	15.00	
10 Total Expenses (4 through 9)		$ 207.76
11 Total (3 plus 10)		$ 13000.00
12 Loan credit or other credit	none	
13 Primary loan (If any)	none	
14. Amount of loan for guaranty or insurance		13000.00

(The following sections must be checked)

☒ (2) That the contemplated terms of payment required in any mortgage to be given in part payment of the purchase price or the construction cost bear a proper relation to the veteran's present and anticipated income and expenses, and that the nature and condition of the property is such as to be suitable for dwelling purposes, and

☒ (3) That the price paid or to be paid by the veteran for such property or for the cost of construction, repairs, alterations, or improvements does not exceed the reasonable value thereof as determined by proper appraisal dated Dec. 15, 1947 (appraisal must be made within 6 months prior to date of loan), made by Louis S. Rockett an appraiser designated by the Administrator (appraisal attached)

☒ (4) That the undersigned is a qualified lender as specified in section 500 (d) of the act

☐ (5) That the mortgage or other security instrument (will be) (has been) filed or recorded in accordance with the law of the State in which the property is located, and

☒ (6) There has been no default on the loan up to and including the date of this report.

(Check this section if applicable.)

☒ 7. That there (will be) (has been) ☒ escrowed $ 300.00 or ☐ earmarked $ _____ of the proceeds of the loan for future disbursement subject to section 4303 (c) of the Regulations

The Administrator of Veterans' Affairs is requested to issue ☒ Loan Guaranty Certificate, or ☐ endorse evidence of guaranty on the note or other evidence of indebtedness, or ☐ Certificate of Insurance Credit (*VA Form No. 1871*), and, an amount equivalent to 4 percent of the amount guaranteed (or insured) to be paid to the undersigned lender for credit upon the loan

(IF A CORPORATION)	LENDER
ATTEST	The Excelsior Saving Fund and Loan Association
Impress Corporate Seal only if required by law	BY
	ADDRESS 33 W. Main St., Norristown, Pa.

Federal Statutes provide severe penalties for any fraud, intentional misrepresentation or criminal connivance or conspiracy purpose to influence the issuance of any guaranty or insurance by the Administrator hereunder.

MUST BE SIGNED BY VETERAN

a. I declare that I do not have an application pending for a loan for the purpose stated herein.

b. I previously have used my guaranty benefit for other loan or loans as follows: $ none for real estate, $ none for nonreal estate

I request the Administrator to endorse my honorable discharge or certificate of eligibility for $ 4000.00 of the guaranty benefit available to me

DATE	SIGNATURE OF VETERAN
Oct. 1, 1948	[signature]

FOR USE BY VETERANS ADMINISTRATION

REPORT APPROVED ☐ REPORT DISAPPROVED DATE

ISSUE GUARANTY IN AMOUNT OF $ EQUIVALENT TO % OF LOAN

CREDIT LENDER'S INSURANCE ACCOUNT WITH $ EQUIVALENT TO % OF LOAN

(Signature of authorized agent)

VA FORM 4-1820 (BACK)

[fol. 17] IN UNITED STATES
DISTRICT COURT

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT—June 24, 1959

AND NOW, to wit, this 24 day of June, A. D., 1959, a stipulation of facts having been filed, it is ORDERED that defendant's motion for summary judgment under Rule 56 (b) be and the same is hereby GRANTED for reasons that appear in this Court's opinion dated December 17, 1958, denying plaintiff's motion for judgment under Rule 12 (c).

/s/ GEORGE A. WELSH,
Judge.

[fol. 18] IN UNITED STATES
DISTRICT COURT

NOTICE OF APPEAL—Filed Aug. 13, 1959

Notice is hereby given that the UNITED STATES OF AMERICA, plaintiff above named, hereby appeals to the United States Court of Appeals for the Third Circuit from the Order of the United States District Court for the Eastern District of Pennsylvania entered on June 24, 1959, granting judgment in favor of the defendant and against the plaintiff.

/s/ HAROLD K. WOOD,
United States Attorney.

/s/ DANIEL J. DiGIACOMO,
Assistant United States Attorney.

[fol. 19] IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 13,067

UNITED STATES OF AMERICA, APPELLANT

v.

GEORGE E. SHIMER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued February 18, 1960

Before BIGGS, *Chief Judge*, and STALEY and HASTIE, *Circuit Judges*.

OPINION OF THE COURT—Filed April 8, 1960

By STALEY, *Circuit Judge*.

Is the amount the Veterans Administration can recover on its contract of indemnity with a Pennsylvania veteran limited to the amount which the veteran owes his mortgagee at foreclosure, and must that amount be computed in accordance with Pennsylvania law, including the Pennsylvania Deficiency Judgment Act?[1]

The facta as taken from the stipulation entered into by the parties are as follows: Appellee, George E. Shimer, obtained a loan of $13,000 from the Excelsior Saving Fund and Loan Association (Association) on January 12, 1948, [fol. 20] to purchase residential realty in Whitemarsh Township, Montgomery County, Pennsylvania. The loan was evidenced by a bond and secured by a mortgage on

[1] 12 Purdon's Pa. Stat. Ann. § 2621.1 et seq.

the property issued to the Association on the same date, January 12, 1948, both having been executed by George E. and Mildred F. Shimer, his wife. The loan was to be repaid with interest at 4 per cent per annum in monthly installments of $78.78 over a term of twenty years. Within a month appellee, an eligible veteran, applied to the Veterans Administration (V.A.) for guaranty of said loan pursuant to the provisions of Title III of the Servicemen's Readjustment Act of 1944, as amended, 59 Stat. 626, 38 U.S.C. § 694, et seq. (now 38 U.S.C. § 1801 et seq.), on V.A. Form 4-1820, "Home Loan Report" Shortly thereafter, on February 11, 1948, the V.A. approved the application and issued V.A. Form 4-1899, "Loan Guaranty Certificate," guaranteeing "subject to the Servicemen's Readjustment Act of 1944, as amended, Public Law 268, 79th Congress, and the regulations issued thereunder to the date of this certificate, 37.38 per cent of the indebtedness outstanding from time to time under the loan identified above." Pursuant to the provisions as applied to this $13,000 loan, the guaranty amounted to $4,000. Appellee defaulted on May 12, 1948, and continued in default. On April 12, 1949, the Association filed a Notice of Intention to Foreclose with the V.A., and on May 12, 1949, entered judgment in the Court of Common Pleas of Montgomery County, Pennsylvania, at No. 351, April Term, 1949, to foreclose the mortgage on the property purchased with the loan. Sheriff's sale followed on June 29, 1949, where the property was purchased for $250 by the Association. The Association thereupon filed a claim with the V.A. for payment of the $4,000 loan guaranty on July 8, 1949, and the V.A. paid this amount on October 7, 1949. While this claim was pending before the V.A., the Association sold the property to third parties for $10,500. At no time did the Association comply with the provisions of the Pennsylvania Deficiency Judgment Act.

[fol. 21] This action was initiated in the District Court for the Eastern District of Pennsylvania by the United States to recover the sums paid by the V.A. to the Association. The government asserted it was entitled to recover under either of two counts. The first count was

based on its rights as a subrogee of the Association,[2] and the second count was based on a right of indemnity. An answer was filed by the appellee alleging that no obligation existed under either theory inasmuch as the mortgagee after it purchased the property at judicial sale had failed to file a petition to fix the fair market value of the property pursuant to the Pennsylvania Deficiency Judgment Act. The government thereafter filed a motion for judgment on the pleadings which was denied by the district judge in an opinion issued December 17, 1958. The parties entered into a stipulation of facts, and the district court thereafter granted appellee's motion for summary judgment on June 24, 1959, under Rule 56(b).

On appeal the government contends that it is entitled to indemnity for the loss which it suffered as guarantor of the loan on the basis of a valid regulation binding upon the appellee that is not impaired or limited in any way by the provisions of Pennsylvania law concerning deficiency judgments. The government asserts that "the court below has grafted onto the rights and liabilities running between the United States and defendant [appellee] in their independent contract of indemnity, state law considerations *which have point only respecting the relationship between defendant and the bank in the first instance,* or secondarily between the defendant and the bank's subrogee. We think it clear that state law control of this latter relationship can affect only those rights which the subrogee takes through the bank, and can not affect other rights independently transacted." (Emphasis supplied.)

We agree with the government that an independent indemnity relationship was created by the veteran's ap- [fol. 22] plication for guaranty of his loan. We further agree that the terms of that guaranty are governed by the Servicemen's Readjustment Act of 1944, as amended, (Veterans Act) and the regulations promulgated pursuant thereto. Although Section 506 of the Act, 38 U.S.C.

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[2] The government has evidently abandoned its claim as subrogee, for in its appeal it has not raised that issue.

(1952 ed.) § 694g, entitled "Procedure on default," authorizes payment of the guaranty by the V.A. in the case of each and every default, it does not purport to spell out the amount which is to be paid; it merely refers to the guaranty. The House Report of the Committee of Conference, dated December 17, 1945, U.S. Code Cong. Serv., 79th Cong., 1st Sess. (1945), 938-939, in considering the procedure on default, stated that "In the event the veteran defaulted in payment of his loan and after suit on foreclosure and sale *the deficiency was determined*, then upon notification from the lender, the Administrator would pay to the lender its guaranty not in excess of $2,000 and not in excess of *the deficiency*, and be subrogated to the rights of the lender to the extent of the amount paid on the guaranty." (Emphasis supplied.)[3]

An examination of the Act fails to disclose any attempt on the part of Congress to supplant state law for determining the amount of the deficiency on the loan between the mortgagor and the mortgagee, which deficiency, up to the statutory limit, is the amount and the only amount which may be paid by the V.A. under the guaranty. The regulations promulgated under the Act make it equally clear, as we later demonstrate, that state law was intended to be followed in determining the amount of the indebtedness to which the guaranty related.

Although the government concedes, as we have heretofore noted, that state law applies to the basic indebtedness between the mortgagor and the mortgagee, it maintains that state law does not apply to the indemnity agreement between the veteran and the government. It seemingly asserts that it can recover under the indemnity [fol. 23] agreement whatever amount it paid to the mortgagee. The amount payable under the indemnity agreement, however, is limited to the amount which the V.A. under the statute is *required* to pay on its guaranty and not the amount which it actually pays. As we have indicated, the amount which it is legally required to pay

[3] The Senate Bill was substituted for the House Bill; however, on page 940 of the same report, it is stated: "Section 506, relating to procedure on default, is retained substantially as in the House Bill."

is the deficiency on foreclosure. That deficiency represents the then indebtedness between the mortgagor and the mortgagee.

The government principally relies on a regulation, since modified, which stated that "Any amounts paid to the creditor by the Administrator pursuant to the guaranty shall constitute a debt due to the United States by the veteran on whose application the guaranty was made * * *." 38 Code Fed. Regs. (1944 Supp.) § 36.4043. This is hardly persuasive, for that regulation was modified to read "Any amounts paid by the Administrator *on account of the liabilities* of any veteran guaranteed or insured under the provisions of the act shall constitute a debt owing to the United States by such veteran." 38 Code Fed. Regs. (1949 ed.) § 36.4323(e). In any case, even under the earlier regulation the amounts to be paid were regulated by the guaranty, and this was intended only to reimburse the mortgagee in an amount not to exceed the loss he might suffer through default computed as of the date of foreclosure. See 38 Code Fed. (1956 rev.) § 36.4320(a)(3)(iii) and (4)(d). Since the section in the regulations upon which the government relies, i.e., 38 Code Fed. Regs. (1949 ed.) § 36.4323(e), refers to the "liabilities of any veteran" (to the mortgagee) and the entire Veterans Act refers to an underlying obligation created by state law, we are convinced that federal law requires a referral to the state law in this instance.

In addition, Section 36.4321, entitled "Computation of guaranty claims; subsequent accounts," specifically indicates such a procedure in subsection (a), for it provides:

"Subject to the limitation that the total amounts payable shall in no event exceed the amount origi-
[fol. 24] nally guaranteed, the amount payable on a claim for the guaranty shall be the percentage of the loan originally guaranteed applied to the indebtedness computed as of the date of claim but not later than (1) the date of judgment or of decree of foreclosure * * *. *Deposits or other credits or set-offs legally applicable to the indebtedness* on the date of computation *shall be applied in reduction of the indebtedness* on which the claim is based. Any escrowed or

earmarked funds not subject to superior claims of third persons must likewise be so applied." (Emphasis supplied.)[4]

Certainly, one must refer to state law to discover what credits or set-offs are legally applicable to the indebtedness between the mortgagor and the mortgagee. In the instant case where Pennsylvania law is applicable, including the Pennsylvania Deficiency Judgment Act, on the critical date, the date of judgment or of decree of foreclosure, the appellee had a set-off or credit. The Pennsylvania law provides that where the mortgagee purchases the property at foreclosure, the fair market value of the property must be applied against the debt.[5] It also pro-

[4] If this or any other regulation issued by the Administrator be interpreted to deny to the veteran-mortgagor the defense of payment to the mortgagee either partial or complete such regulation would be invalid as being contrary to the Act. See 38 U.S.C. (1952 ed.) § 694(b), presently codified in 38 U.S.C. (1958 ed.) § 1803(b), (c) and (d).

[5] In Sophia Wilkes Bldg. & Loan Ass'n v. Rudloff, 348 Pa. 477, 35 A.2d 278 (1944), it was stated:

"'* * * * The act, recognizing plaintiff's right to recover the full amount of the judgment, merely provides for an inquiry in regard to a transaction which occurred subsequent to the judgment, to wit, [what occurred at] the sheriff's sale, in order to ascertain what amount of payment plaintiff has received, such an inquiry being analogous to the trial of an issue of payment raised as a defence * * *.'" 35 A.2d at page 280.

"* * * [T]he defendant is entitled to have the judgment against him satisfied of record, for it has been discharged as completely and effectually as if it had been actually paid off in cash." 35 A.2d at page 280.

"We merely recognize and give effect to the repayment of the judgment debt which the plaintiff has already received through his purchase at the sheriff's sale of a property of the defendant which is now presumed in law to have been worth the full amount of the judgment." 35 A.2d at page 281.

"It was the receipt of a property worth the amount of the judgment which discharged it. The Deficiency Judgments Act merely compelled effect to be given to that fact. We do not know, nor do we think it important, whether the property was actually worth the full amount of the judg-

[fol. 25] vides a method of determining fair market value. If the mortgagee considers the fair market value to be less than the debt he may have appraisers appointed to have the amount fixed. In effect, the mortgagor is given a legal credit or set-off against the amount of indebtedness owing the mortgagee to the extent of the fair market value of the security which the mortgagee has obtained.[5] Thus this squarely brings the present case within the regulation cited above.

The second string to the government's bow is the administrative decision rendered in 1945 by the Administrator of Veterans' Affairs, 1 Decisions of Administrator of Veterans' Affairs No. 625, pp. 1154-1164 (Jan. 22, 1945). Basically, this administrative opinion is concerned with states where the mortgagee is completely barred from proceeding against the mortgagor even for an actual deficiency in the event of default. It is worthy of note that Pennsylvania does not do so, but merely limits the recovery by the mortgagee to the amount of the actual deficiency after giving credit for the fair market value of the property taken over by the mortgagee. We agree with the opinion insofar as it asserts that Congress intended the Veterans Act to be beneficial to veterans throughout the country. Of course, in those states where no deficiency judgments are permitted and thus the mort-

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ment. It may be assumed that it was, for, if it was not, the plaintiff would have moved, before the expiration of the period of limitation prescribed by the Act, to have a lesser value fixed for the property. However that may be, the Act itself has now created a conclusive presumption that the property was worth at least one hundred percent of the judgment." 35 A.2d at page 281.

In accord, Union Trust Co. of New Castle v. Tutino, 353 Pa. 145, 44 A.2d 556 (1945); Pennsylvania Co. for Insurance on Lives and Granting Annuities v. Scott, 346 Pa. 18, 29 A.2d 328 (1942).

[5] If the property had been purchased by a third party at the sale, resulting in the receipt by the mortgagee of an amount of cash equal to or in excess of the amount of the debt, the Administrator could hardly claim that the veteran could not raise the defense of payment in full in an action brought against him on his indemnity contract.

gagee is completely deprived of its right to collect the full amount of indebtedness, the Act would be ineffectual. In such cases the state law must be presumed to be inapplicable. However, if the Administrator's decision be [fol. 26] interpreted as providing that all state laws for the determination of the actual amount of the indebtedness existing at the time of foreclosure are superseded, we must emphatically disagree. We find nothing in the Veterans Act that would lead us to that conclusion and much that convinces us that Congress never intended to deprive veteran-mortgagors of the benefits of Acts such as the Pennsylvania one that is clearly ameliorative. Certainly there was no intention to put these individuals in a worse position than nonveteran-mortgagors.

The V.A. also relies upon the case of McKnight v. United States, 259 F.2d 540 (C.A. 9, 1958). It claims that case holds that all state laws upon the subject of deficiency judgments are superseded by the Veterans Act. There the court held that it need not determine whether the California Deficiency Judgment Act applied because under settled principles of mortgage law, "the value of the mortgagor's equity in the mortgaged property is fixed by the amount bid at the foreclosure sale, and * * * in the absence of fraud, a mortgagor has no right to compel the mortgagee to account to him for any profit made upon a subsequent resale of the premises." 259 F.2d at page 544.[7] With this we agree. The case merely stands for the proposition that the amount of the liability of a veteran to the United States is fixed at the time of foreclosure and that subsequent sales of the property can neither decrease nor increase this liability: There is no

[7] Four district court cases, which treat the problem rather summarily, are in accord with the government's position. United States v. Ryder, 168 F. Supp. 263 (N.D. Ga. 1958); United States v. Jones, 155 F. Supp. 52 (M.D. Ga. 1957); United States v. Gallardo, 154 F. Supp. 373 (N.D. Calif. 1957); United States v. Henderson, 121 F. Supp. 343 (S.D. Iowa, 1953). None of these cases involved a statute such as that in the instant case, and more particularly none considered how the guaranty was to be computed. Rather they assumed that the payment by the government to the mortgagee was authorized under the statute and regulations.

holding in the case that the amount received by the mortgagee at foreclosure is determined by federal law, and that, of course, is what we must determine in this case.

One other aspect of the Pennsylvania Act deserves our attention. It provides that if no action is taken within [fol. 27] the six-month period, not only is the indebtedness to the mortgagee satisfied but the obligor, *guarantor*, or anyone else liable directly or indirectly to the mortgagee is released. This strikingly points up the difference between the Pennsylvania and California Acts, for the latter has been held not to apply to guarantors. Security-First National Bank of Los Angeles v. Chapman, 41 Cal. 2d 219, 106 P.2d 431 (1940).

The government's contention that it paid the entire amount of its guaranty prior to the end of the six-month period leads once again to the central question. On what basis did it compute the indebtedness of the mortgagor to the mortgagee so that the amount to be paid under the guaranty, in accordance with the statute and regulations, could have been ascertained? Until the mortgagee indicated, by taking steps under the Pennsylvania Act that it was not satisfied that the fair market value of the property which it then held[8] was at least equal to the indebtedness, there was no way of calculating any liability of the veteran and in turn any liability of the government on its guaranty. In the absence of such action on the part of the mortgagee within the six-month period, its claim against the veteran was fully satisfied by the security and the guarantor (V.A.) was released.

The judgment will be affirmed.

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[8] It must be remembered that the mortgagee is not forced or required to bid in the property, in which event the amount bid by the third party would be credited on the debt.

[fol. 28] IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 13,067

UNITED STATES OF AMERICA, APPELLANT

vs.

GEORGE E. SHIMER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: BIGGS, Chief Judge, and STALEY and HASTIE, Circuit Judges.

JUDGMENT—April 8, 1960

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

April 8, 1960

(File Endorsement Omitted)

[fol. 29] Clerk's Certificate to foregoing transcript omitted in printing

[fol. 30] SUPREME COURT OF THE UNITED STATES

• • • •

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—June 30, 1960

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be and the same is hereby, extended to and including August 22, 1960.

/s/ William J. Brennan Jr.
Associate Justice of the Supreme Court of the United States.

Dated this 30 day of June 1960.

[fol. 31] SUPREME COURT OF THE UNITED STATES

• • • •

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—August 18, 1960

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 6th, 1960.

/s/ Hugo L. Black
Associate Justice of the Supreme Court of the United States.

Dated this 18th day of August 1960

[fol. 32] SUPREME COURT OF THE UNITED STATES

No. 392, October Term, 1960

UNITED STATES, PETITIONER

vs.

GEORGE E. SHIMER

ORDER ALLOWING CERTIORARI—November 14, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 33] SUPREME COURT OF THE UNITED STATES

• • • •

ORDER GRANTING MOTION OF RESPONDENT FOR LEAVE TO PROCEED IN FORMA PAUPERIS—NOV. 14, 1960

ON CONSIDERATION of the motion of the respondent for leave to proceed *in forma pauperis* in this case,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

November 14, 1960

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FILED
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JAMES R. BROWNING, Clerk

No. 392

In the Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA, PETITIONER

v.

GEORGE E. SHIMER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

GEORGE E. SHIMER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on April 8, 1960.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania (R. 9a–13a)[1] and the same court's order of June 24, 1959, confirming its previous opinion (R. 17a), are not reported. The opinion of the Court of Appeals (App. B, *infra*, pp. 22–32) is reported at 276 F. 2d 792.

[1] All record references are to the pages of Appendix B to the brief for the United States in the Court of Appeals—which constituted the record before the court below.

JURISDICTION

The judgment of the Court of Appeals was entered on April 8, 1960 (App. B, *infra*, pp. 32–33). By order of Mr. Justice Brennan, dated June 30, 1960, the time within which to file a petition for a writ of certiorari was extended to and including August 22, 1960. By order of Mr. Justice Black, dated August 18, 1960, a further extension was granted until and including September 6, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the liability of the Veterans Administration to pay the holder of an indebtedness guaranteed by the Administrator of Veterans Affairs under the G.I. home loan program, and the obligation of the veteran borrower to reimburse the Veterans Administration for the amount paid to the holder in satisfaction of the guaranty, are subject to state deficiency judgment (and comparable) legislation.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in Appendix A, *infra*, pp. 17–21.

STATEMENT

This suit was filed by the United States to recover the amount paid out by it under its guaranty, as a result of default by respondent in payment of his G.I. home loan. The basic facts are not in dispute and in large part were stipulated by the parties in the District Court (R. 15a–16a).

On January 12, 1948, respondent obtained a loan of $13,000 from the Excelsior Saving Fund and Loan

Association (the "bank" or "mortgagee") to purchase a home in Whitemarsh Township, Montgomery County, Pennsylvania. The loan was to be repaid with interest at 4 percent per annum in monthly installments of $78.78 over a twenty year term. It was evidenced by a bond and secured by a mortgage on the property purchased, and these were executed by respondent and his wife. On February 6, 1948, respondent applied to the Administrator of Veterans Affairs for a guaranty of his loan under the provisions of the Servicemen's Readjustment Act of 1944, as amended, and for this purpose he signed Veterans Administration Form 4–1820, "Home Loan Report." This report on its face states that "[r]egulations issued under the act, and in effect on the date of any loan which is submitted and accepted or approved for a guaranty or for insurance thereunder shall govern the rights, duties, and liabilities of the parties to such loan and any provisions of the loan instruments inconsistent with such regulations are hereby amended and supplemented to conform thereto. (Section 4334 of the Regulations)" (R. 16a).

The Veterans Administrator approved the Home Loan Report and the application for guaranty, and on February 11, 1948, issued VA Form 4–1899, "Loan Guaranty Certificate", guaranteeing "[s]ubject to the Servicemen's Readjustment Act of 1944, as amended, Public Law 268, 79th Congress, and the regulations issued thereunder to the date of this certificate, 37.38 percent of the indebtedness outstanding from time to time under the loan identified above." Ap-

plied to the $13,000 loan, this percentage equalled $4000, taking into consideration the statutory maximum.

On May 12, 1948, respondent defaulted in payment of the loan, and after continued default the bank filed with the Veterans Administration, on April 12, 1949, a Notice of Intention to Foreclose. By May 12, 1949, the bank entered judgment against respondent and his wife in the Court of Common Pleas of Montgomery County, Pennsylvania, to foreclose the mortgage on the property purchased with the loan. At a sheriff's sale on June 29, 1949, the property was purchased by the bank upon a bid of $250.00. On July 8, 1949, the bank filed a claim with the Veterans Administration for payment of the loan guaranty of $4000.00, and the Administrator paid this amount to the bank on October 7, 1949. The bank had meanwhile, on September 8, 1949, sold the property to third parties for $10,500.00. The bank did not file a petition for assessment of the "fair value" of the property under the provisions of the Deficiency Judgment Act of the Commonwealth of Pennsylvania, Act of 1941, July 16, P.L. 400, Section 1, 12 Pa. Stats., Section 2621.1, *et seq., infra,* pp. 20–21.

Thereafter, the United States filed a complaint in the District Court against respondent, in two counts. The first asserted the government's claim as subrogee of the rights of the mortgagee-bank, and the second asserted its claim for indemnity (R. 3a–5a). Respondent's answer asserted that, in view of the operation of the state law concerning deficiency judgments after the sale of real property subject to mortgage foreclosures, the Veterans Administration

had paid the bank at a time when the veteran was under no obligation to the bank, the payment was therefore improper and was not reimbursable (R. 6a–7a). The District Court rejected both bases of recovery asserted by the United States, holding (R. 9a–13a):

> * * * that the Pennsylvania Deficiency Judgment Act is applicable in the instant case, and that alleging that the mortgagee bank failed to comply with the provisions thereof is a valid defense to this suit.

The court rejected the subrogation claim on the ground that respondent's state law defense against the bank, based upon the bank's failure to secure a judicial appraisal of the fair value of the mortgaged property, could be asserted also against the United States as subrogee of the bank.[2] The claim for indemnity was denied on the ground that, under the state deficiency judgment law, the Veterans Administration paid the guaranty when the respondent was not obligated to the bank, that therefore the VA payment to the bank was not a payment made "on account of the liabilities" of a veteran, and accordingly did not constitute a debt of the veteran owing to the United States under Veterans Administration Regulation 36.4323(e), which provides:

> Any amounts paid by the Administrator on account of the liabilities of any veteran guaranteed or insured under the provisions of the act shall constitute a debt owing to the United

[2] The United States did not appeal from this ruling against its claim as subrogee of the bank's rights, and it does not seek to raise the subrogation issue in this Court.

States by such veteran. [38 C.F.R. 1949 ed., 36.4323(e)]

The Court of Appeals affirmed. It held that the obligation of the Administrator under the Veterans Administration's guaranty is to pay no more than the deficiency after foreclosure and sale and that this amount is to be determined exclusively by state law (App. B, *infra*, p. 26):

> An examination of the Act fails to disclose any attempt on the part of Congress to supplant state law for determining the amount of the deficiency on the loan between the mortgagor and the mortgagee, which deficiency, up to the statutory limit, is the amount and the only amount which may be paid by the V.A. under the guaranty. The regulations promulgated under the Act make it equally clear, as we later demonstrate, that state law was intended to be followed in determining the amount of the indebtedness to which the guaranty related.

The court further ruled that the amount payable by the respondent veteran to the Government on the Government's indemnity claim "is limited to the amount which the V.A. under the statute is *required* to pay on its guaranty and not the amount which it actually pays" (App. B, *infra*, p. 26). Since, under this interpretation, the Veterans Administration, in the light of Pennsylvania law, was not required to pay anything at all to the lender bank, the Court of Appeals affirmed the District Court's dismissal of the Government's indemnity claim against the respondent.

REASONS FOR GRANTING THE WRIT

The decision below, in drastically but unjustifiably restricting the extent of the Federal Government's obligation to lending institutions participating in the G.I. home loan program, immediately jeopardizes that significant program to such an extent as to make review essential at this time. The need for review is underscored because the opinion of the Court of Appeals is (1) contrary to the requirements of the controlling federal statute and its legislative history, as well as the consistent and fully expressed administrative construction from the time of the passage of the relevant provisions of the Act in 1944 and 1945; and (2) appears inconsistent with a ruling of the Court of Appeals for the Ninth Circuit as well as other lower court decisions.

1. Because of its holding that the Veterans Administration is not liable to the lending institution until state deficiency judgment proceedings have been instituted and completed, the Third Circuit's decision threatens to bring to a halt a nation-wide program which fosters the purchase by veterans of their own homes, a broad and beneficial program designed by Congress to facilitate veterans' readjustment to civilian life.[3] The general economic and social impact of this G.I. home loan program, over the past decade and a half, has been of great magnitude, at relatively

[3] Congress recently extended the program for two years until July 25, 1962, for World War II veterans (Public Law 86-665, signed July 14, 1960). About 14 million veterans are still eligible for loan benefits under the program; of these, over 10 million are World War II veterans. Korean veterans are eligible until 1965.

small cost to the Government.[4] The crux of the program has been that the Government's guaranty was designed to take the place, so far as the lender is concerned, of the home purchaser's cash down-payment which would otherwise have to be made—the cash equity of the borrower in mortgaged property without which lenders normally do not advance funds and on which the lender can always count in the event of default.

In a private loan with a substantial down payment, the lender is assured on default of getting at least the full down-payment, plus whatever he can actually realize out of the foreclosed property; he may also be able to obtain a deficiency judgment against the borrower (in many states) if he can establish a "fair market value" for the property less than the indebtedness due. Under the G.I. home loan program, as it has been administered up to this time, the lender is assured on default of getting at least the full amount of the guaranty (which stands for him in the place of the down-payment),[5] plus what he can realize from the property; he may also be able in appropriate cases to obtain a deficiency judgment. However, un-

[4] As of July 31, 1960, almost 6 million veterans have acquired homes under this program. Of these, the veteran has defaulted in only 1.1%. In this case, respondent made no down-payment and none was required of him (*supra*, p. 3). The guaranty was the equivalent in this case to a down-payment of over 30%.

[5] General Omar Bradley, then Administrator of Veterans Affairs, stressed, in his testimony before the Senate Finance Committee, that the guaranty provision "was intended to provide what ordinarily is required as a down payment in connection with purchasing a home, farm, business, et cetera. In other words, the guaranty took the place of the purchaser's equity." It must be remembered, too, that the governmental security

der the rulings of the Court of Appeals in this case, the lender (in many jurisdictions) is assured of only the amount he can realize from the mortgaged property; he ordinarily has no cash down-payment on which to rely and he can reach the Government's guaranty only to the extent that he establishes in deficiency judgment proceedings a "fair market value" for the property less than the debt.

The decision below thus strikes at the heart of the VA program by destroying the substitute protection—the protection which takes the place of the cash down-payment—conferred on lenders by the Government guaranty. Since the decision means that any losses suffered on default in these circumstances would not have to be borne by the Government, but would be shouldered exclusively by the lender, lenders can be expected to withdraw completely from the program. If lenders must stand the risks of the G.I. home loan program alone—without the protection afforded by a large cash down-payment, without the substitute protection given by the guaranty mechanism as understood up to this time, and at interest rates measurably below those available in private financing—lenders will not lend under a G.I. guaranty and there will be no G.I. home loan program. This is the well-founded fear of the Veterans Administration, based upon its experience and inquiries from lending institutions since the announcement of the decision below. Just as maintenance of negotiability is the guiding star of negotiable instruments law—for the benefit of society

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provided was a guaranty and not an indemnity. In other words, the Government, to the extent as to the amount guaranteed, absorbs the loss instead of sharing it with the creditor." (Senate Hearings on H.R. 3749, 79th Cong., 1st Sess., 1945, p. 31). See, also, *infra*, pp. 11–12.

generally—so the ability to obtain lenders is essential to this loan program—for the benefit of all veterans.*

2. The obligation of the Veterans Administration under its guaranty to the lender is spelled out simply and clearly by Section 506 of the Servicemen's Readjustment Act, App. A, *infra*, p. 18. Under Section 506, the Federal Government's obligation is one of absolute guaranty under which liability is incurred immediately upon default:

> In the event of default in the payment of any loan guaranteed under this subchapter, the holder of the obligation shall notify the Administrator who shall thereupon pay to such holder the guaranty * * *.

And, for some 14 years, the Administrator, in interpreting Section 506, has ruled that the liability under the guaranty is absolute (2 Administrator's Decisions, Veterans' Administration, Nos. 589 and 625). Thus, in the present case, the Government, recognizing its guaranty liability as absolute under the Act and following its regular practice, paid the lending institution, upon respondent's default, the full

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*The Veterans Administration advises that there are approximately 255,700 G.I. loans now outstanding in Pennsylvania alone, involving a principal balance of approximately $1,750,000,000. Also, approximately 5,000 VA claims arising out of loans made in Pennsylvania have been previously adjudicated under the VA's interpretation of the program, and the VA can reasonably anticipate requests from many of those veterans to review these claims in the light of the decision below.

Moreover, it should be pointed out that, in view of the large number of states having deficiency judgment legislation (including Georgia, Maryland, New York, Idaho, Ohio, South Carolina, Michigan, North Dakota, Mississippi, Oklahoma,

guaranty of $4,000.[7] The decision below, in sharp contrast, holds that under Pennsylvania law this $4,000 payment was improper and that the Government was not required to pay anything at all to the lender.

For this conclusion, the Third Circuit mistakenly relies on an earlier version of Section 506 which never became law.[8] It is this error that led the court below to fail to recognize the absolute nature of the guaranty liability at the time of default—and to rule, instead, that liability under the guaranty arises only after a determination of deficiency on foreclosure. When

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Louisiana, Wisconsin, and Vermont), the future impact of the Third Circuit's conclusions will not, in all probability, be confined to the Third Circuit—itself an important region of the country. Also, very large numbers of claims against veterans have been processed and collected, in circumstances comparable to those presented here, throughout the country during the past 16 years. See fn. 15, *infra*, p. 15.

[7] Pursuant to its interpretation of the basic statute, the Veterans Administration's regulations provide that the lender's claim shall consist of the guaranty, less certain credits. In the case of a foreclosure sale, as here, in which no upset price has been established by the VA, the lender, in settling with the Administrator, credits against the guaranty payable the net proceeds of the sale. Veterans Administration Regulations 36.4321(a), 36.4321(b) and 36.4320(a)(4), 38 C.F.R. (1949 ed.), 36.4321 (a) and (b), 36.4320(a)(4). See also the regulation's definition of the guaranty, *infra*, pp. 18–19.

The provisions of these regulations are incorporated into the contract with the veteran and the bank. Veterans Regulation 36.4334, 38 C.F.R. (1949 ed.) 36.4334.

[8] In this connection, the court's opinion quotes (App. B, *infra*, p. 25) some sentences from the Statement of the House Managers on the Report of the Committee of Conference, dated December 17, 1945, *describing the House bill*. These sentences describe the Government's liability to the lender under the House bill as being "not in excess of the deficiency" determined after foreclosure and sale.

some of the loan guaranty provisions of Title III of the Servicemen's Readjustment Act of 1944 were found to be unacceptable to some mortgage lenders, Title III of the Act was completely rewritten in 1945. In the Resolution which originated in, and was passed by the House in 1945,[9] provision was made for the guaranty to apply, after foreclosure, only to the deficiency—in effect, an indemnity rather than an absolute guaranty. When hearings were held in the Senate, the testimony of General Omar Bradley, then Administrator of Veterans Affairs,[10] and Mr. Morton Bodfish, Executive Vice President of the United States Savings and Loan League, Chicago, Illinois,[11] showed that the House version would not be acceptable to lenders in place of the cash down-payment usually required in mortgage lending, since a substantial part of the loss from the deficiency would always fall on the lender. As a result of this testimony, the Senate rewrote and passed Section 506 to read as it now reads—*i.e.*, to retain the absolute guaranty feature of the program.[12] In the Conference Committee the House receded from its provision and accepted the Senate version of Section

[9] H. Res. 3749, 79th Cong.

[10] Senate Hearings on H.R. 3749, 79th Cong., 1st Sess. (1945), before a Subcommittee of the Senate Committee on Finance, pp. 31–33; see also fn. 5, *supra*, p. 8.

[11] *Ibid.*, pp. 169–170. See also the similar testimony of Chester R. Davis, Chairman, American Bankers Association Committee on Service for Veterans; the Association's membership of 15,000 banks represents about 98% of the total banking resources of the country. *Ibid.*, pp. 349–350.

[12] S. Rept. 698 (Senate Committee on Finance), to accompany H.R. 3749, 79th Cong., 1st Sess., p. 5.

506.[13] The House then passed the measure as amended by the Senate and it was signed by the President. Nevertheless, the court below has primarily based its holding on the original House version of Section 506, despite the fact that that version was discarded and a different one enacted in order to avoid the results which would have followed from passage of the original proposal.[13a]

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[13] Although it recognizes that the final bill accepts much of the Senate's loan provisions, the Statement of the House Managers on the Conference Report (H. Rept. No. 1449, 79th Cong., 1st Sess., p. 17) does state that "Section 506, relating to procedure on default, is retained substantially as in the House bill." This is an over-statement, as comparison of the two provisions will reveal. In particular, the portions of the House bill providing for computation of the Government's liability after ascertainment of the deficiency were *not* retained in the final measure but were significantly changed (as Section 506 shows).

That the Senate completely rejected the House proposal to substitute an indemnity for the absolute guaranty is clear from the Senate report on the Senate version (S. Rept. No. 698, p. 4):

"It is appropriate to point out here *an important difference between the House bill and the bill reported by your committee*, as relates to loans. *Under the House bill*, by amendments to section 500(a) and elsewhere in the Readjustment Act, the lending agency and the veteran were in effect permitted to make their own bargain, and the loan is automatically guaranteed 50 percent by the Administrator of Veterans' Affairs. This would afford no protection either to the veterans or to the Government. *Your committee did not accept this plan and has retained the basic principles of the existing law with such changes as may be necessary* in section 500(a) and in other provisions which will be noted, to liberalize and clarify the law. *At the same time, there is preserved the guaranty principle of the existing act instead of the House provision, which is in effect a contract of indemnity, with the lender and the Government sharing the loss pro rata.*" [Emphasis added.]

[13a] That Congress knew the difference between a guaranty and an indemnity is clearly shown by Sec. 508, 38 U.S.C. (1952 ed.) 694i.

3. In our view, the decision of the court below is inconsistent with *McKnight* v. *United States*, 259 F. 2d 540 (C.A. 9), as well as with *United States* v. *Gallardo*, 154 F. Supp. 373 (N.D. Cal.); *United States* v. *Jones*, 155 F. Supp. 52 (M.D. Ga.); *United States* v. *Henderson*, 121 F. Supp. 343 (S.D. Iowa); and *Stalcup* v. *Easterly*, 351 P. 2d 735 (Okla. Sup. Ct.).[14] Indeed, the law had been considered to be well settled until the adverse decision in the present case. The same basic question was involved in each of these cases—the right of the Veterans Administration to be reimbursed for the amount paid on the guaranty when no deficiency judgment was obtained under state law. In *McKnight*, there was no liability enforceable under state law for a deficiency at the time the claim on the guaranty was paid by the Government. The veteran contended there (as the court below held here) that there was no liability on the veteran to reimburse the Government because there was no liability of the veteran to pay the lender at the time the Veterans Administration paid the guaranty. The Ninth Circuit rejected this contention, and in holding that it need not determine whether the California Deficiency Judgment Act applied, stated (259 F. 2d at 543, 544):

> We rely on the general proposition that the subject matter of this litigation arises under the federal law and cannot be impaired by a state statute. * * *

Recognizing that the veteran had been sued on his independent contract of indemnity, and not for any

[14] There have been a great many comparable decisions in the federal district courts in which no opinions have been written.

deficiency judgment, the court on this basis affirmed a judgment for the United States.

This result is also suggested by *Wissner* v. *Wissner*, 338 U.S. 655. This Court there held that the proceeds of a National Service Life Insurance policy were to be distributed according to the terms of the policy itself without regard to the conflicting provisions of California community property laws. To interpret the policy in terms of state law, said the Court, would frustrate "the deliberate purpose of Congress," 338 U.S. at 659. Here, too, the Government's right of indemnity from the veteran, as a valid part of the statutory and regulatory scheme governing the rights and duties of the parties under a contract to guarantee a federal home loan, cannot be diminished or destroyed by provisions of state law. In the event of a conflict between the regulation providing for indemnity and provisions of Pennsylvania law restricting that right, the Supremacy Clause of the Constitution makes it clear that the federal legislation and regulations must govern.[15]

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[15] It has been the regular practice of the Veterans Administration, over the past 16 years, to hold the veteran liable for amounts properly paid to the lender under the guaranty. This is provided explicitly by regulation (App. A, *infra*, p. 20), and the VA has processed a very large number of claims against veterans in circumstances identical or similar to those involved here. Many of these claims have been collected from other monies due the veteran, and many suits have also been brought. See also fn. 6, *supra*, pp 9–10, and p. 14, *supra*.

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CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

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SEPTEMBER 1960.

APPENDIXES

APPENDIX A

STATUTES AND REGULATIONS INVOLVED

1. The Servicemen's Readjustment Act of 1944, as amended, 38 U.S.C. 694, *et seq.* (as it appears in the 1952 edition of the United States Code),[1] provides in pertinent part as follows:

Section 500(b), 38 U.S.C. 694(b):

> (b) *Terms and conditions; interest.*
>
> Loans guaranteed under this subchapter shall be payable under such terms and conditions as may be agreed upon by the parties thereto, subject to the conditions and limitations of this subchapter and the regulations issued pursuant to section 694d of this title: *Provided,* That the liability under the guaranty within the limitations of this subchapter shall decrease or increase pro rata with any decrease or increase of the amount of the unpaid portion of the obligation: *Provided further,* That loans guaranteed under this subchapter shall bear interest at a rate not exceeding 4 per centum per annum and shall be payable in full in not more than thirty years, or in the case of loans on farm realty in not more than forty years: *And provided further,* That (1) the maturity of a non-real-estate loan shall not exceed ten years; (2) any loan for a term in excess of five years shall be amortized in accordance with established procedure; (3) except as provided in section 694e of this title any real-estate loan, other than for repairs,

[1] Recodified January 1, 1959, as 38 U.S.C., Chapter 37.

alterations or improvements, shall be secured by a first lien on the realty, and a non-real-estate loan, except as to working or other capital, merchandise, good-will and other intangible assets, shall be secured by personalty to the extent legal and practicable: *And provided further,* That the Administrator, with the approval of the Secretary of the Treasury, may prescribe by regulation a higher maximum rate of interest than otherwise prescribed in this section for loans guaranteed under this subchapter, but not exceeding 4½ per centum per annum, if he finds that the loan market demands it.

* * * * *

Section 504(a), 38 U.S.C. 694d(a):

* * * * *

(a) The Administrator is authorized to promulgate such rules and regulations not inconsistent with this subchapter, as are necessary and appropriate for carrying out the provisions of this subchapter * * *

* * * * *

Section 506, 38 U.S.C. 694g:

* * * * *

In the event of default in the payment of any loan guaranteed under this subchapter, the holder of the obligation shall notify the Administrator who shall thereupon pay to such holder the guarantee not in excess of the pro rata portion of the amount originally guaranteed, and shall be subrogated to the rights of the holder of the obligation to the extent of the amount paid on the guaranty:

* * * * *

2. Veterans Administration Regulation 36.4301(q), 38 C.F.R. (1949 ed.), 36.4301(q), provides as follows:

(q) "Guaranty" means the obligation of the United States, assumed by virtue of Title III

of the act, to repay a specified percentage of a loan upon the default of the primary debtor.

Veterans Administration Regulation 36.4321 (a) and (b), 38 C.F.R. (1949 ed.) 36.4321 (a) and (b), provide as follows:

> *Computation of guaranty claims; subsequent accountings.*—(a) Subject to the limitation that the total amounts payable shall in no event exceed the amount originally guaranteed, the amount payable on a claim for the guaranty shall be the percentage of the loan originally guaranteed applied to the indebtedness computed as of the date of claim but not later than (1) the date of judgment or of decree of foreclosure or (2) in non-judicial foreclosures the date of publication of the first notice of sale, or (3) in cases in which the security is repossessed without a judgment, decree or foreclosure the date the holder repossesses the security, or (4) if no security is available, or no possession takes place, the date of claim but not more than 6 months after the first uncured default. Deposits or other credits or setoffs legally applicable to the indebtedness on the date of computation shall be applied in reduction of the indebtedness on which the claim is based. Any escrowed or earmarked funds not subject to superior claims of third persons must likewise be so applied.
>
> (b) Credits accruing from the proceeds of a sale or other disposition of the security subsequent to the date of computation, and prior to the submission of the claim, shall be reported to the Administrator incident to such submission, and the amount payable on the claim shall in no event exceed the remaining balance of the indebtedness.

Veterans Administration Regulation 36.4323, 38 C.F.R. (1949 ed.) 36.4323, provides in pertinent part as follows:

Subrogation and indemnity.—(a) The Administrator shall be subrogated to the contract and the lien or other rights of the holder to the extent of any sum paid on a guarantee or on account of an insured loss * * *. No partial or complete release by a creditor shall impair the rights of the Administrator with respect to the debtor's obligation.

* * * * *

(e) Any amounts paid by the Administrator on account of the liabilities of any veteran guaranteed or insured under the provisions of the act shall constitute a debt owing to the United States by such veteran.

3. The pertinent provisions of the Pennsylvania Deficiency Judgment Act (Commonwealth of Pennsylvania, Act of July 16, 1941, 12 Pa. Stats. Section 2621.1, *et seq.*), are as follows:

2621.1—Whenever any real property has heretofore been or is hereafter sold, directly or indirectly, to the plaintiff in execution proceedings and the price for which such property has been sold was or is not sufficient to satisfy the amount of the judgment, interest and costs and the plaintiff seeks to collect the balance due on said judgment, interest and costs, the plaintiff or plaintiffs shall petition the court having jurisdiction to fix the fair market value of the real property sold as aforesaid. * * *

2621.6—* * * After the hearing and the determination by the court of the fair market value of the property sold the debtor, obligor, guarantor and any other person liable directly or indirectly to the plaintiff or plaintiffs for the payment of the debt shall be released and discharged of such liability to the plaintiff to the extent of the fair market value of said property as previously agreed to by the plaintiff or plaintiffs or determined by the court * * * and thereupon petitioner may proceed by appropri-

ate proceedings to collect the balance of the debt.

2621.7—The plaintiff or plaintiffs shall file all petitions in accordance with section one and section two of this act not later than six months after the sale of any real property: * * * In the event no petition is filed within such period, the debtor, obligor, guarantor and any other person liable directly or indirectly to the plaintiff or plaintiffs for the payment of the debt shall be released and discharged of such liability to the plaintiff or plaintiffs.

APPENDIX B

In the United States Court of Appeals for the Third Circuit

No. 13067

UNITED STATES OF AMERICA, APPELLANT

v.

GEORGE E. SHIMER

On Appeal From the United States District Court for the Eastern District of Pennsylvania

Argued February 18, 1960

Before BIGGS, *Chief Judge,* and STALEY and HASTIE, *Circuit Judges*

OPINION OF THE COURT
(Filed April 8, 1960)

By STALEY, *Circuit Judge:*

Is the amount the Veterans Administration can recover on its contract of indemnity with a Pennsylvania veteran limited to the amount which the veteran owes his mortgagee at foreclosure, and must that amount be computed in accordance with Pennsylvania law, including the Pennsylvania Deficiency Judgment Act?[1]

The facta as taken from the stipulation entered into by the parties are as follows: Appellee, George E. Shimer, obtained a loan of $13,000 from the Excelsior, Saving Fund and Loan Association (Associa-

[1] 12 Purdon's Pa. Stat. Ann. § 2621.1 et seq.

tion) on January 12, 1948, to purchase residential realty in Whitemarsh Township, Montgomery County, Pennsylvania. The loan was evidenced by a bond and secured by a mortgage on the property issued to the Association on the same date, January 12, 1948, both having been executed by George E. and Mildred F. Shimer, his wife. The loan was to be repaid with interest at 4 per cent per annum in monthly installments of $78.78 over a term of twenty years. Within a month appellee, an eligible veteran, applied to the Veterans Administration (VA) for guaranty of said loan pursuant to the provisions of Title III of the Servicemen's Readjustment Act of 1944, as amended, 59 Stat. 626, 38 U.S.C. § 694, et seq. (now 38 U.S.C. § 1801 et seq.), on VA Form 4–1820, "Home Loan Report." Shortly thereafter, on February 11, 1948, the VA aproved the application and issued VA Form 4–1899, "Loan Guaranty Certificate," guaranteeing "subject to the Servicemen's Readjustment Act of 1944, as amended, Public Law 268, 79th Congress, and the regulations issued thereunder to the date of this certificate, 37.38 per cent of the indebtedness outstanding from time to time under the loan identified above." Pursuant to the provisions as applied to this $13,000 loan, the guaranty amounted to $4,000. Appellee defaulted on May 12, 1948, and continued in default. On April 12, 1949, the Association filed a Notice of Intention to Foreclose with the VA, and on May 12, 1949, entered judgment in the Court of Common Pleas of Montgomery County, Pennsylvania, at No. 351, April Term, 1949, to foreclose the mortgage on the property purchased with the loan. Sheriff's sale followed on June 29, 1949, where the property was purchased for $250 by the Association. The Association thereupon filed a claim with the VA for payment of the $4,000 loan guaranty on July 8,

1949, and the VA paid this amount on October 7, 1949. While this claim was pending before the VA, the Association sold the property to third parties for $10,500. At no time did the Association comply with the provisions of the Pennsylvania Deficiency Judgment Act.

This action was initiated in the District Court for the Eastern District of Pennsylvania by the United States to recover the sums paid by the VA to the Association. The government asserted it was entitled to recover under either of two counts. The first count was based on its rights as a subrogee of the Association,[2] and the second count was based on a right of indemnity. An answer was filed by the appellee alleging that no obligation existed under either theory inasmuch as the mortgagee after it purchased the property at judicial sale had failed to file a petition to fix the fair market value of the property pursuant to the Pennsylvania Deficiency Judgment Act. The government thereafter filed a motion for judgment on the pleadings which was denied by the district judge in an opinion issued December 17, 1958. The parties entered into a stipulation of facts, and the district court thereafter granted appellee's motion for summary judgment on June 24, 1959, under Rule 56(b).

On appeal the government contends that it is entitled to indemnity for the loss which it suffered as guarantor of the loan on the basis of valid regulation binding upon the appellee that is not impaired or limited in any way by the provisions of Pennsylvania law concerning deficiency judgments. The government asserts that "the court below has grafted onto the rights and liabilities running between the United

[2] The government has evidently abandoned its claim as subrogee, for in its appeal it has not raised that issue.

States and defendant [appellee] in their independent contract of indemnity, state law considerations *which have point only respecting the relationship between defendant and the bank in the first instance,* or secondarily between the defendant and the bank's subrogee. We think it clear that state law control of this latter relationship can affect only those rights which the subrogee takes through the bank, and cannot affect other rights independently transacted." (Emphasis supplied.)

We agree with the government that an independent indemnity relationship was created by the veteran's application for guaranty of his loan. We further agree that the terms of that guaranty are governed by the Servicemen's Readjustment Act of 1944, as amended, (Veterans Act) and the regulations promulgated pursuant thereto. Although Section 506 of the Act, 38 U.S.C. (1952 ed.) § 694g, entitled "Procedure on default," authorizes payment of the guaranty by the VA in the case of each and every default, it does not purport to spell out the amount which is to be paid; it merely refers to the guaranty. The House Report of the Committee of Conference, dated December 17, 1945, U.S. Code Cong. Serv., 79th Cong., 1st Sess. (1945) 938–939, in considering the procedure on default, stated that "In the event the veteran defaulted in payment of his loan and after suit on foreclosure and sale *the deficiency was determined,* then upon notification from the lender, the Administrator would pay to the lender its guaranty not in excess of $2,000 and not in excess of *the deficiency,* and be subrogated to the rights of the lender to the extent of the amount paid on the guaranty." [3] (Emphasis supplied.)

[3] The Senate Bill was substituted for the House Bill; however, on page 940 of the same report, it is stated: "Section

An examination of the Act fails to disclose any attempt on the part of Congress to supplant state law for determining the amount of the deficiency on the loan between the mortgagor and the mortgagee, which deficiency, up to the statutory limit, is the amount and the only amount which may be paid by the VA under the guaranty. The regulations promulgated under the Act make it equally clear, as we later demonstrate, that state law was intended to be followed in determining the amount of the indebtedness to which the guaranty related.

Although the government concedes, as we have heretofore noted, that state law applies to the basic indebtedness between the mortgagor and the mortgagee, it maintains that state law does not apply to the indemnity agreement between the veteran and the government. It seemingly asserts that it can recover under the indemnity agreement whatever amount it paid to the mortgagee. The amount payable under the indemnity agreement, however, is limited to the amount which the VA under the statute is *required* to pay on its guaranty and not the amount which it actually pays. As we have indicated, the amount which it is legally required to pay is the deficiency on foreclosure. That deficiency represents the then indebtedness between the mortgagor and the mortgagee.

The government principally relies on a regulation, since modified, which stated that "Any amounts paid to the creditor by the Administrator pursuant to the guaranty shall constitute a debt due to the United States by the veteran on whose application the guaranty was made * * *." 38 Code Fed. Regs. (1944 Supp.) § 36.4043. This is hardly persuasive,

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506, relating to procedure on default, is retained substantially as in the House Bill."

for that regulation was modified to read "Any amounts paid by the Administrator *on account of the liabilities* of any veteran guaranteed or insured under the provisions of the act shall constitute a debt owing to the United States by such veteran." 38 Code Fed. Regs. (1949 ed.) § 36.4323(e). In any case, even under the earlier regulation the amounts to be paid were regulated by the guaranty, and this was intended only to reimburse the mortgagee in an amount not to exceed the loss he might suffer through default computed as of the date of foreclosure. See 38 Code Fed. (1956 rev.) § 36.4320(a)(3)(iii) and (4)(d). Since the section in the regulations upon which the government relies, i.e., 38 Code Fed. Regs. (1949 ed.) § 36.4323(e), refers to the "liabilities of any veteran" (to the mortgagee) and the entire Veterans Act refers to an underlying obligation created by state law, we are convinced that federal law requires a referral to the state law in this instance.

In addition, Section 36.4321, entitled "Computation of guaranty claims; subsequent accounts," specifically indicates such a procedure in subsection (a), for it provides:

> Subject to the limitation that the total amounts payable shall in no event exceed the amount originally guaranteed, the amount payable on a claim for the guaranty shall be the percentage of the loan originally guaranteed applied to the indebtedness computed as of the date of claim but not later than (1) the date of judgment or of decree of foreclosure * * *. *Deposits or other credits or set-offs legally applicable to the indebtedness* on the date of computation *shall be applied in reduction of the indebtedness* on which the claim is based. Any escrowed or earmarked funds not subject to

superior claims of third persons must likewise be so applied. [Emphasis supplied.][4]

Certainly, one must refer to state law to discover what credits or set-offs are legally applicable to the indebtedness between the mortgagor and the mortgagee. In the instant case where Pennsylvania law is applicable, including the Pennsylvania Deficiency Judgment Act, on the critical date, the date of judgment or of decree of foreclosure, the appellee had a set-off or credit. The Pennsylvania law provides that where the mortgagee purchases the property at foreclosure, the fair market value of the property must be applied against the debt.[5] It also provides

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[4] If this or any other regulation issued by the Administrator be interpreted to deny to the veteran-mortgagor the defense of payment to the mortgagee either partial or complete such regulation would be invalid as being contrary to the Act. See 38 U.S.C. (1952 ed.) § 694(b), presently codified in 38 U.S.C. (1958 ed.) § 1803(b), (c) and (d).

[5] In *Sophia Wilkes Bldg. & Loan Ass'n* v. *Rudloff*, 348 Pa. 477, 35 A.2d 278 (1944), it was stated:

"'* * * The act, recognizing plaintiff's right to recover the full amount of the judgment, merely provides for an inquiry in regard to a transaction which occurred subsequent to the judgment, to wit, [what occurred at] the sheriff's sale, in order to ascertain what amount of payment plaintiff has received, such an inquiry being analogous to the trial of an issue of payment raised as a defence * * *.'" 35 A.2d at page 280.

"* * * [T]he defendant is entitled to have the judgment against him satisfied of record, for it has been discharged as completely and effectually as if it had been actually paid off in cash." 35 A.2d at page 280.

"We merely recognize and give effect to the repayment of the judgment debt which the plaintiff has already received through his purchase at the sheriff's sale of a property of the defendant which is now presumed in law to have been worth the full amount of the judgment." 35 A.2d at page 281.

"It was the receipt of a property worth the amount of the judgment which discharged it. The Deficiency Judgments Act

method of determining fair market value. If the mortgagee considers the fair market value to be less than the debt he may have appraisers appointed to have the amount fixed. In effect, the mortgagor is given a legal credit or set-off against the amount of indebtedness owing the mortgagee to the extent of the fair market value of the security which the mortgagee has obtained.[4] Thus this squarely brings the present case within the regulation cited above.

The second string to the government's bow is the administrative decision rendered in 1945 by the Administrator of Veterans' Affairs, 1 Decisions of Administrator of Veterans' Affairs No. 625, pp. 1154–1164 (Jan. 22, 1945). Basically, this administrative opinion is concerned with states where the mortgagee is completely barred from proceeding against the mortgagor even for an actual deficiency in the event of default. It is worthy of note that Pennsylvania does not do so, but merely limits the recovery by the

---

merely compelled effect to be given to that fact. We do not know, nor do we think it important, whether the property was actually worth the full amount of the judgment. It may be assumed that it was, for, if it was not, the plaintiff would have moved, before the expiration of the period of limitation prescribed by the Act, to have a lesser value fixed for the property. However that may be, the Act itself has now created a conclusive presumption that the property was worth at least one hundred percent of the judgment." 35 A.2d at page 281.

In accord, *Union Trust Co. of New Castle* v. *Tutino*, 353 Pa. 145, 44 A.2d 556 (1945); *Pennsylvania Co. for Insurance on Lives and Granting Annuities* v. *Scott*, 346 Pa. 13, 29 A.2d 328 (1942).

[4] If the property had been purchased by a third party at the sale, resulting in the receipt by the mortgagee of an amount of cash equal to or in excess of the amount of the debt, the Administrator could hardly claim that the veteran could not raise the defense of payment in full in an action brought against him on his indemnity contract.

mortgagee to the amount of the actual deficiency after giving credit for the fair market value of the property taken over by the mortgagee. We agree with the opinion insofar as it asserts that Congress intended the Veterans Act to be beneficial to veterans throughout the country. Of course, in those states where no deficiency judgments are permitted and thus the mortgagee is completely deprived of its right to collect the full amount of indebtedness, the Act would be ineffectual. In such cases the state law must be presumed to be inapplicable. However, if the Administrator's decision be interpreted as providing that all state laws for the determination of the actual amount of the indebtedness existing at the time of foreclosure are superseded, we must emphatically disagree. We find nothing in the Veterans Act that would lead us to that conclusion and much that convinces us that Congress never intended to deprive veteran-mortgagors of the benefits of Acts such as the Pennsylvania one that is clearly ameliorative. Certainly there was no intention to put these individuals in a worse position than nonveteran-mortgagors.

The VA also replies upon the case of *McKnight* v. *United States*, 259 F. 2d 540 (C.A. 9, 1958). It claims that case holds that all state laws upon the subject of deficiency judgments are superseded by the Veterans Act. There the court held that it need not determine whether the California Deficiency Judgment Act applied because under settled principles of mortgage law, "the value of the mortgagor's equity in the mortgaged property is fixed by the amount bid at the foreclosure sale, and * * * in the absence of fraud, a mortgagor has no right to compel the mortgagee to account to him for any profit made upon a subsequent

resale of the premises." 259 F. 2d at page 544.[7] With this we agree. The case merely stands for the proposition that the amount of the liability of a veteran to the United States is fixed at the time of foreclosure and that subsequent sales of the property can neither decrease nor increase this liability. There is no holding in the case that the amount received by the mortgagee at foreclosure is determined by federal law, and that, of course, is what we must determine in this case.

One other aspect of the Pennsylvania Act deserves our attention. It provides that if no action is taken within the six-month period, not only is the indebtedness to the mortgagee satisfied but the obligor, *guarantor,* or anyone else liable directly or indirectly to the mortgagee is released. This strikingly points up the difference between the Pennsylvania and California Acts, for the latter has been held not to apply to guarantors. *Security-First National Bank of Los Angeles* v. *Chapman,* 41 Cal. 2d 219, 106 P. 2d 431 (1940).

The government's contention that it paid the entire amount of its guaranty prior to the end of the six-month period leads once again to the central question. On what basis did it compute the indebtedness of the mortgagor to the mortgagee so that the amount to be

---

[7] Four district court cases, which treat the problem rather summarily, are in accord with the government's position. *United States* v. *Ryder*, 168 F. Supp. 263 (N.D. Ga. 1958); *United States* v. *Jones*, 155 F. Supp. 52 (M.D. Ga. 1957); *United States* v. *Gallardo*, 154 F. Supp. 373 (N.D. Calif. 1957); *United States* v. *Henderson*, 121 F. Supp. 343 (S.D. Iowa, 1953). None of these cases involved a statute such as that in the instant case, and more particularly none considered how the guaranty was to be computed. Rather they assumed that the payment by the government to the mortgagee was authorized under the statute and regulations.

paid under the guaranty, in accordance with the statute and regulations, could have been ascertained? Until the mortgagee indicated, by taking steps under the Pennsylvania Act that it was not satisfied that the fair market value of the property which it then held * was at least equal to the indebtedness, there was no way of calculating any liability of the veteran and in turn any liability of the government on its guaranty. In the absence of such action on the part of the mortgagee within the six-month period, its claim against the veteran was fully satisfied by the security and the guarantor (VA) was released.

The judgment will be affirmed.

In the United States Court of Appeals for the Third Circuit

No. 13067

UNITED STATES OF AMERICA, APPELLANT

v.

GEORGE E. SHIMER

On Appeal From the United States District Court For the Eastern District of Pennsylvania

Present: BIGGS, *Chief Judge,* and STALEY and HASTIE, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

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* It must be remembered that the mortgagee is not forced or required to bid in the property, in which event the amount bid by the third party would be credited on the debt.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

APRIL 8, 1960.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

UNITED STATES OF AMERICA,
Petitioner,

vs.

GEORGE E. SHIMER,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF THE NATIONAL ASSOCIATION OF MUTUAL SAVINGS BANKS, THE NATIONAL ASSOCIATION OF HOME BUILDERS AND THE MORTGAGE BANKERS ASSOCIATION OF AMERICA.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 392.

UNITED STATES OF AMERICA,

PETITIONER,

v.

GEORGE E. SHIMER,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

MOTION OF THE NATIONAL ASSOCIATION OF MUTUAL SAVINGS BANKS, THE NATIONAL ASSOCIATION OF HOME BUILDERS, AND THE MORTGAGE BANKERS ASSOCIATION OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*.

The above named applicants; trade associations representing the mutual savings banks of the United States, the home builders of the United States, and the mortgage bankers of the United States, hereby respectfully move this Court pursuant to U. S. Sup. Ct. Rule 42, Par. 2, 28 U. S. C. A., for leave to file the attached brief as *amici curiae* in support of the petitioner. Consent to the filing of the attached brief has been refused by counsel for respondent.

Mutual savings banks are the largest investors in the United States in home loans guaranteed by the Veterans' Administration. As of September 30, 1960, mutual savings

banks held 9.1 billion dollars in V. A. guaranteed loans out of a total national program of 29.8 billion dollars. These loans have been made in reliance on the long established practice of the Veterans' Administration of fulfilling its guaranty without requiring the lending bank to bring action under state laws to establish the amount of the borrower's deficiency. If the decision below is allowed to stand, many of the loans now held will become subject to a potential jeopardy not contemplated when the loans were made. In the event of substantial economic decline and the consequent increase in defaults, the lender could be forced by the decision below to bear an unanticipated share of any deficiency and the not inconsiderable legal costs of bringing innumerable actions under state deficiency laws. Petitioner has pointed out in its petition for certiorari that deficiency judgment legislation exists in many states, including Georgia, Maryland, New York, Idaho, Ohio, South Carolina, Michigan, North Dakota, Mississippi, Oklahoma, Louisiana, Wisconsin and Vermont. In these states, mutual savings banks hold over $2 billion in V. A. guaranteed mortgages. In the State of Pennsylvania, the situs of the realty involved in this case, the mutual savings banks hold $455,731,000 in V. A. guaranteed mortgages.

The above named applicant, the National Association of Mutual Savings Banks, by virtue of the considerable commitment of its members in V. A. mortage loans, respectfully submits that it has interest in the disposition of this case. Further, the trustees of mutual savings banks owe the strictest fiduciary duty to their banks in managing assets and since a decision to affirm could put in question the realizable value of these assets upon default, it may well be a responsibility of these trustees to seek to intervene in this case through the medium of their trade association.

The home builders of the United States represented by the National Association of Home Builders, are interested in the disposition of this case because of the great number of sales of homes which they are able to make by virtue of the willingness of institutional lenders to lend money to veteran-purchasers under the V. A. guaranty loan program without requiring a down payment. This source of purchaser funds may be greatly reduced if the decision below is affirmed and thus the prospective construction and sale by home builders and purchases by veterans throughout the country will be seriously prejudiced.

The Mortgage Bankers Association of America is interested in the disposition of this case because it has among its members all types of institutional investors, including life insurance companies and savings banks. The Association also represents mortgage companies throughout the United States which originate V. A. mortgages in large volume and service them for the institutional investors they represent. If the decision below is affirmed, considerable unanticipated financial burden will be imposed upon mortgage companies which are charged, under their servicing contracts with the responsibility for protecting the interests of their investors for a fixed amount that cannot be changed. Also if the decision below is allowed to stand, the opportunities for sales of V. A. mortgages by mortgage companies will be greatly reduced.

The attached brief will set forth arguments on the probable effect of this case on the V. A. lending program that will be relevant in determining whether the decision below tends to frustrate the legislative intent of the Servicemen's Readjustment Act of 1944, 38 U. S. C. A. 1801 et. seq. These arguments may not be available to, or may not be adequately urged by, petitioner.

The applicants are greatly interested in obtaining a holding by this Court as to the applicability of state deficiency judgment laws to the Servicemen's Readjustment Act of 1944 so that savings banks and mortgage bankers may reappraise the extent of their prudent participation in the V. A. guaranty program and home builders may adjust their building programs in recognition of the probable financing funds that will henceforth be available.

The applicants pray that the Court grant this motion and permit the filing of the attached brief.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 392

UNITED STATES OF AMERICA,

PETITIONER,

vs.

GEORGE E. SHIMER,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF THE NATIONAL ASSOCIATION OF MUTUAL SAVINGS BANKS, THE NATIONAL ASSOCIATION OF HOME BUILDERS, AND THE MORTGAGE BANKERS ASSOCIATION OF AMERICA AS AMICI CURIAE IN SUPPORT OF THE PETITIONER.

Statement.

As the parties are described and the facts stated in the briefs of petitioner and respondent, it is deemed unnecessary to repeat them here.

ARGUMENT.

The decision of the court below is incompatible with the purpose and provisions of the Servicemen's Readjustment Act of 1944 and therefore should be reversed.

I.

The purpose of facilitating the financing of homes for veterans has been frustrated by the decision of the court below because the effect of that decision will be to deter institutional lenders from investing in V. A. guaranteed loans. These loans, generally bearing lower interest rates than conventional loans, have been attractive to lenders in the past because of the security afforded by the guaranty device and because lenders could seek investment throughout the country under a standard form of agreement and be confident that the guaranty device would accord predictable substantive rights in all jurisdictions. Section 506 of the Servicemen's Readjustment Act of 1944 (38 U. S. C. A. 694g, now 38 U. S. C. A. 1816) provides that payment on the guaranty be made in the event of "default". Lending institutions have loaned millions of dollars in reliance on this practice and on what they have confidently believed the Act to provide. They are now to understand that although the guaranty still theoretically exists, the amount of the guaranty is contingent upon the future determination by state courts of the "fair market value" of the property securing the loan.

The decision of the court below thus destroys that certainty of guaranty which the Act led lenders to accept in lieu of the standard requirement of a substantial down payment. If the real value of the guaranty is to remain unpredictable until deficiency judgment proceedings under

various and varying state laws have been pursued, lenders cannot regard the guaranty as an acceptable substitute for a down payment. If lenders are forced to re-establish the down payment requirement in the case of veterans seeking homes, many veterans will be effectively denied the very opportunities which the Congress sought to extend to them in the Act. In any event, a searching reappraisal by lenders of the future value of investment in V. A. guaranteed mortgage loans, particularly in the case of requests for 100% loans, will be necessary if the decision of the court below is allowed to stand.

An example of the fact that the actual amount of the guaranty is crucial to the lending decision can be seen by reference to the law of one of the larger savings bank states. The N. Y. Banking law, Sec. 235 (20) authorizes savings banks to invest in "any bond and mortgage guaranteed pursuant to the provisions of the act of Congress entitled the 'Servicemen's Readjustment Act of 1944', or (3) provided the mortgage is a first lien, any bond and mortgage at least twenty per centumn of which is guaranteed pursuant to the provisions of such act;". The savings banks of the State of New York held 6.3 billion dollars in V. A. mortgages as of the end of 1959. Unlike conventional loans, which are restricted to New York or an adjoining state (N. Y. Banking Law, Sec. 235 (6)) savings banks may make V. A. guaranteed loans anywhere in the United States (Section 235(20)). Further, in reliance on the guaranty feature, the New York legislature has also exempted V. A. loans (Sec. 235(20)) from statutory provisions limiting the total percent of mortgages which may be held by a savings bank and from maximum loan to appraised value limitations on individual mortgages. It seems clear that the New York legislature, in allowing nationwide investment, and other exemptions to V. A. mortgages, was relying on an

actual, not a hypothetical, guaranty of 20% of each first mortgage loan, applied uniformly no matter what state was the situs of the realty.

Since the decision of the court below makes the actual dollar guaranty of V. A. mortgage loans dependent on the future contingency of what fair market value may be set on the property pursuant to state court proceedings, the 20% formula on first lien mortgages can no longer be said to obtain with certitude, and it must therefore be expected that affirmance of the decision below will have the possible result of rendering billions of dollars of V. A. mortgage loans illegal investments under the laws of New York.

Lenders throughout the United States will find a further deterrent to future participation in the V. A. program, *i.e.*, the uncertainty created by the decision of the court below as to the applicability of state law. The court states, *United States* v. *Shimer* (276 F 2d 792, at 796-7):

> "Of course, in those states where no deficiency judgments are permitted and thus the mortgagee is completely deprived of his right to collect the full amount of the indebtedness, the Act would be ineffectual. In such cases the state law must be presumed to be inapplicable."

Thus, the reasoning of the decision below leads to the inference that state laws are the criterion of the amount of the Veterans' Administration guaranty, but only those state laws that do not frustrate the Act so as to render it ineffectual. Apparently, then, by application of this line of reasoning, there may be state laws which are compatible with the Act and which must be used in interpreting the Act, while other state laws would render the Act ineffectual and would be regarded as inapplicable. The reasoning of the court below on this point demands of the lender an impracti-

cal nicety of judgment in appraising the probable application of state laws to the guaranty loan program, and thus the actual amount of the effective guaranty. Since ability to change state laws rests primarily with the state, a kaleidoscopic series of patterns concerning the effective guaranty under the federal Act could be created by state action in adopting various amendments to pertinent state laws, frequently without consideration of the resultant effect such action would have upon the federal Act. Unless the Congress is to be regarded as contemplating this multi-state chaos to the obvious detriment of the historic and efficient functioning of the federal Act, then the decision of the court below must be rejected.

II.

The court below has stated that although Section 506 of the Servicemen's Readjustment Act of 1944 (38 U. S. C. A. 694 g, now 38 U. S. C. A. 1816) "authorizes payment of the guaranty by V. A. in the case of each and every default, it does not purport to spell out the amount which is to be paid; it merely refers to the guaranty." (276 F 2d, 794). The court went on to conclude that since no detailed formula is found in the federal statute, computation of the amount of the guaranty is a matter to be decided by reference to state law.

It is submitted that many of the reasons found in support of this conclusion were erroneous and that more compelling reasons pointing toward a contrary result were omitted.

Absence of a guaranty formula in the statute need not and perhaps should not suggest the conclusion that the legislative intent was to leave the problem to state determination. It is at least as likely that a guaranty formula

was omitted from the statute in order that the question might be dealt with flexibly by federal regulation rather than for the purpose of allowing basic substantive rights under a national program to be decided pursuant to as many formulas as there are states. Further, an example of recourse to regulation rather than state law in determining the amount of guaranty is found in 38 U. S. C. A. 1821: "Incontestability". That section empowers the Administrator to issue regulations establishing partial defenses to the amount payable on the guaranty. This is hardly consistent with the view of the court below that the entire pattern of the Act contemplates reference to state law in order to determine the amount of the guaranty.

Conclusion.

Wherefore, these *amici curiae* respectfully urge that the decision of the court below be reversed.

Respectfully submitted,

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Affidavit of Service.

I, PATRICK JAMES RIORDAN, counsel to the National Association of Mutual Savings Banks, and an attorney admitted to practice in the courts of the State of New York, but not a member of the bar of this court, do hereby depose and say that on the 16 day of February, 1961, pursuant to Rule 33 (3)(c), 28 U. S. C. A., I served a copy of the foregoing motion and brief on the following attorneys by mailing a copy to each of them in duly addressed, special delivery, postage prepaid envelopes to their respective addresses noted below, said attorneys representing all the parties to the captioned proceedings:

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Solicitor General
Washington 25, D. C.

EDWARD DAVIS, Esq.,
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(SIGNED) Patrick James Riordan

Subscribed and sworn to before me, at New York
New York this 16 day of February, 1961.

Dorothea D. Chase

DOROTHEA D. CHASE
Notary Public, State of New York
No. 60-8567[illegible]
Qualified in Westchester County
Certificate filed in N. Y. County Clk.
Commission Expires [illegible]

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No. 392

In the Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA, PETITIONER

v.

GEORGE E. SHIMER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 392

UNITED STATES OF AMERICA, PETITIONER

v.

GEORGE E. SHIMER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (R. 8–12) is unreported. The opinion of the court of appeals (R. 18–26) is reported at 276 F. 2d 792.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1960 (R. 27). By order of Mr. Justice Brennan, dated June 30, 1960, the time within which to file a petition for a writ of certiorari was extended to and including August 22, 1960 (R. 28). By order of Mr. Justice Black, dated August 18, 1960, a further extension was granted to and including September 6, 1960 (R. 28). The petition for a writ of certiorari

was filed on September 6, 1960, and was granted on November 14, 1960 (R. 29; 364 U.S. 889). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a state deficiency-judgment statute releasing guarantors from liability to a lender to the extent of the judicially-determined "fair market value" of the property bid in by the lender at a foreclosure sale (or, if no timely petition to fix the value is filed, completely) relieves the United States of liability to the lender on its guaranty of home-financing loans made to eligible veterans under the Servicemen's Readjustment Act of 1944 (as amended, 38 U.S.C. (1952 ed.) 694–694n), notwithstanding that the regulations promulgated under the Act expressly require the lender to give credit, for purposes of the guaranty, only for the actual proceeds of a sale of the security unless the Veterans' Administrator has specified an upset price for which credit must be given.

2. Whether a veteran upon whose default on a guaranteed loan the United States became obligated, under the terms of the Act, to make payment of the guaranty to the lender is liable to indemnify the United States for the payment.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of Title III of the Servicemen's Readjustment Act of 1944, 58 Stat. 291, as amended by the Act of December 28, 1945, 59 Stat. 626, are set forth in Appendix A (pp. 61–64, *infra*); of the Veterans' Administration regulations promulgated under that Act, in Appendix B (pp. 65–74,

infra); and of the Pennsylvania Deficiency Judgment Act (12 Pa. Stats. (Purdon) §§ 2621.1 *et seq.*), in Appendix C (pp. 75–76, *infra*).

STATEMENT

This is an action brought by the United States to recover indemnity from respondent for $4,000 the Veterans' Administration paid the lender upon respondent's default on a home-financing loan guaranteed under Title III of the Servicemen's Readjustment Act of 1944 (the "G.I. Bill") (Appendix A, pp. 61–64, *infra*). The facts were stipulated (R. 13–16).

1. On January 12, 1948, respondent obtained a loan of $13,000 from the Excelsior Saving Fund and Loan Association (the "Bank") for the purchase of a home in Whitemarsh, Pennsylvania. The loan, with 4% interest, was payable in monthly installments over a 20-year term and was secured by a first mortgage on the property purchased (R. 13). The purchase price of the property was $12,792 and was paid entirely out of the proceeds of the loan (see lines 3 and 12, R. 16).

On February 6, 1948, the Bank, pursuant to § 500(c) of the Act, forwarded to the Veterans' Administration a "Home Loan Report" (VA Form 4–1820) certifying that the loan met all the requirements of the Act and requesting issuance of a "Loan Guaranty Certificate" evidencing that the loan was guaranteed under § 500(a) of the Act. Respondent's certificate of eligibility for a guaranty was forwarded with the report (see R. 15) and, in a portion of the report required to be signed by him, respondent certified that he had not previously used any part of his

eligibility and requested that the full $4,000 guaranty benefit available to him be applied to the loan (R. 16). The form recited that (R. 15 (bottom)):

> Regulations issued under the act, and in effect on the date of any loan which is submitted and accepted or approved for a guaranty or for insurance thereunder shall govern the rights, duties, and liabilities of the parties to such loan and any provisions of the loan instruments inconsistent with such regulations are hereby amended and supplemented to conform thereto. * * * .

The V.A. approved the report and the application for guaranty and, on February 11, 1948, issued a certificate guaranteeing, "Subject to the Servicemen's Readjustment Act * * * and the regulations issued thereunder to the date of this certificate, [30.76 [1]] percent of the indebtedness outstanding from time to time under the loan" (R. 13).

2. Respondent defaulted in making payments on May 12, 1948, and continued in default thereafter. A year later, on May 12, 1949, the Bank, having given the V.A. the required one-month notice of its intention to do so, entered judgment against respondent in the Court of Common Pleas of Montgomery County, Pennsylvania, to foreclose its mortgage on the property. A sheriff's sale was held on June 29,

[1] The 37.38% figure appearing in the stipulated facts is erroneous. The percentage is fixed by the statute (see § 500 (a) and (b)) as the ratio of the maximum amount of the guaranty, $4,000, to the original amount of the loan, $13,000, which is in fact 30.76%. Although it does not appear of record, the correct figure (30.76%) was used throughout in the subsequent computations and accountings.

1949, and the Bank purchased the property on a bid of $250 (R. 14).

On July 8, 1949, the Bank filed a claim with the V.A. for payment of the full guaranty of $4,000 (the indebtedness having exceeded $13,000 at the date of the judgment of foreclosure (see note 16, pp. 30–31, *infra*)). The V.A. paid the claim on October 7, 1949 (R. 14).

At no time did the Bank file a petition under the Pennsylvania Deficiency Judgment Act (12 Pa. Stats. (Purdon) §§ 2621.1 *et seq.*) to have the "fair market value" of the property determined. The Bank resold the property on September 8, 1949, for $10,500 (R. 14).

3. On January 10, 1958, the United States brought this action to recover indemnity from respondent for the $4,000 paid the Bank under the guaranty,[2] the action being based on a provision of the Veterans' Administration regulations, in force at the time of the loan, providing:

> § 36.4323 *Subrogation and indemnity.* * * *
> (e) Any amounts paid by the Administrator on account of the liabilities of any veteran guaranteed or insured under the provisions of the act shall constitute a debt owing to the United States by such veteran.

In denying the government's motion for judgment on the pleadings, the district court filed an opinion (R. 8–12) holding that, under the Pennsylvania De-

[2] Second Count of the complaint (R. 4–5). The First Count alternatively sought recovery by way of subrogation to the Bank's rights on the note (see R. 5 (prayer)). Denial of recovery on that count was not challenged in the court of appeals and we do not challenge it here.

ficiency Judgment Act, the V.A., as guarantor, was released from liability to the Bank upon the Bank's purchase of the property at the sheriff's sale, followed by its failure to file a petition within six months to have the "fair market value" of the property determined and credited against the indebtedness. The V.A. not having been liable to make the payment to the Bank, it followed, the court held, that it was not entitled to indemnity from respondent. Upon a motion for summary judgment (R. 12) and a stipulation of facts (R. 13–16) being filed, the court, on the basis of its opinion on the pleadings, granted judgment for respondent (R. 17).

4. The court of appeals affirmed (R. 18–26). Although agreeing "with the government that an independent indemnity relationship was created by the veteran's application for guaranty of his loan * * * [and] that the terms of that guaranty are governed by the Servicemen's Readjustment Act * * * and the regulations promulgated" under it (R. 20), it held that under the Act and the regulations the amount payable under the guaranty was limited to the "deficiency", and that (R. 21):

> An examination of the Act fails to disclose any attempt on the part of Congress to supplant state law for determining the amount of the deficiency on the loan between the mortgagor and the mortgagee, which deficiency, up to the statutory limit, is the amount and the only amount which may be paid by the V.A. under the guaranty. The regulations promulgated under the Act make it equally clear, as we later demonstrate, that state law was in-

> tended to be followed in determining the amount of the indebtedness to which the guaranty related.

Since "federal law requires a referral to the state law in this instance" (R. 22), the court held that the Pennsylvania Deficiency Judgment Act controlled what "credits" were to be made to the indebtedness for purposes of determining the amount payable on the guaranty under the regulations (R. 22–23). The effect of the Pennsylvania Act being to require the Bank to give a "credit" for the property equal to its value (which, unless a judicial appraisal is obtained, is deemed equal to the indebtedness), it came "squarely * * * within the regulation" (§ 36.4321(a)) the court had construed as requiring such "credits" (R. 24). It concluded accordingly that, upon the Bank's failure to have the value fixed at less than the debt, "its claim against the veteran was fully satisfied by the security and the guarantor (V.A.) was released" (R. 26). The veteran's indemnity liability being, in turn, "limited to the amount which the V.A. under the statute is *required* to pay" (R. 21), it followed that respondent was not liable.

SUMMARY OF ARGUMENT

Upon respondent's default on a $13,000 home-financing loan, $4,000 (*i.e.*, 30.76%) of which was guaranteed by the Veterans' Administration under the Servicemen's Readjustment Act of 1944, the V.A. paid the lending Bank the $4,000 guaranty. The court of appeals denied recovery of indemnity for that payment from respondent on the ground that the V.A. was not liable to pay the guaranty to the Bank. We will show

that (1) the V.A. was liable to the Bank and (2) respondent is therefore liable to indemnify the V.A.

I.

We have no basic disagreement with the court of appeals' holding that the net amount the V.A. was required to pay the Bank out of the guaranty was limited to the Bank's "loss" measured by the indebtedness less a credit for the proceeds of the sale of the security. While the principal amount of the guaranty becomes fixed as a percentage of the indebtedness before crediting the proceeds of foreclosure, the V.A.'s rights of subrogation upon payment of the guaranty necessarily require that the proceeds of foreclosure be taken into account in the final accounting between the V.A. and the lender. The regulations provide, accordingly, that, where, as here, the lender's claim for the guaranty is not submitted until after sale of the security, the amount payable to the lender "shall in no event exceed the remaining balance of the indebtedness" after all "Credits accruing from the proceeds of [the] sale * * * of the security" (§ 36.4321(b)).

The disagreement arises over how those "credits" are to be determined. The court of appeals held that the Act and regulations did not provide for those credits and intended them to be governed by state law. It then held that, under the Pennsylvania Deficiency Judgment Act, the Bank, having itself bought in the property at the sheriff's sale, was required to give credit for the full amount of the debt unless it obtained a judicial appraisal of the "fair

market value" of the property (in which event it would have to give credit for that value).

We need not examine the court of appeals' interpretation of state law, for its basic error was that it overlooked a section of the regulations which *does* provide, expressly and in great detail, for the "amount which shall be credited to the indebtedness of the borrower on account of the value of the security" for purposes of the final accounting on the guaranty. That section (§ 36.4320) provides in substance that, unless the V.A. establishes an "upset price"—a minimum amount for which the lender is required to give credit and at which he has an option to resell the property to the V.A.—the lender need credit only the actual proceeds of the sale (§ 36.4320(a)(4)). Since no upset price was established in this case, the Bank was required to give credit only for the actual proceeds which, being less than the unguaranteed portion of the debt (something over $9,000), left a "remaining balance of the indebtedness" greater than the $4,000 guaranty, and entitled the Bank to payment of the full guaranty.

The foreclosure-credit provisions of § 36.4320 are the heart of the protection afforded lenders by the guaranty. Since the lender is required to give credit (on settlement) for more than the actual proceeds only when he is given an option to resell the property to the V.A. at the specified amount, he is assured of being paid the full guaranty unless he is otherwise made whole in cash. The consequence is that the guaranty affords the lender protection fully equivalent to that normally provided by a down payment,

for with either a 30% down payment or a 30% guaranty the security stands for only 70% of its original cost and the lender has a 30% "cushion" to protect himself against depreciation and expenses of foreclosure. And it is only by affording that degree of protection that the guaranty can serve its intended purpose of inducing lenders to extend 100% financing to veterans unable to make the customarily-required down payment.

Without those provisions, and with resort being made to state law to determine the "credits" to be made for disposition of the security, the guaranty would be virtually worthless. Under the decision below, the lender who, in reliance on the guaranty, does not require a down payment and makes a 100% loan turns out to have no "cushion" at all. The loan being for 100% of the cost of the property, the security itself affords no margin of safety, and he can reach the guaranty only by (1) litigating the "value" of the property and (2) accepting the property in payment of the loan at a judicially-determined "value" that there is no assurance of his being able to realize. It is evident, we think, that few financing institutions would be willing to accept a guaranty as remote and contingent as that in lieu of a down payment and, hence, that the effect of the decision below would be to discourage V.A.-guaranteed financing (*i.e.*, without down payments) in states with deficiency-judgment statutes like Pennsylvania's.

The court of appeals turned to state law only because it overlooked, or failed to appreciate the significance of, the provisions of the regulations pre-

scribing the credits to be made on sale of the security (§ 36.4320). Once the direct conflict between those provisions and Pennsylvania law is recognized, there can be no doubt, we think, that the regulations—expressly authorized by the Act and essential to the functioning of the federal program—are controlling.

II

The court of appeals, denying recovery over against respondent only because of its holding that the V.A. was not liable to the Bank, agreed that respondent would be liable for indemnity if the V.A. was liable to the Bank. That view seems clearly correct, for the right of indemnity—a right of a guarantor universally recognized at common law—is necessarily implicit in the Act creating the guaranty and is expressly provided for in the regulations (§ 36.4323(e)), which, in turn, were incorporated by reference into respondent's application for the guaranty. Nor does that result place the veteran, as has been asserted, in a worse position than a nonveteran, for if respondent is now required to reimburse the V.A. for the $4,000 guaranty paid the Bank he will have lost no more than a nonveteran borrower who would have been required to pay an equivalent amount as a down payment, which he equally would have lost on foreclosure. The only difference is that, because the credit of the United States stood behind him, respondent has been able to defer the making of his "down payment."

ARGUMENT

On respondent's application, the Veterans' Administration guaranteed $4,000 (*i.e.*, 30.76%) of a

$13,000 loan made by the Bank to respondent for the purchase of a home, the amount of the guaranty to be proportionately reduced as the principal of the outstanding indebtedness was reduced. Shortly thereafter, respondent defaulted, and in due course the Bank obtained a judgment of foreclosure on the mortgaged property, later bidding the property in at the sheriff's sale for $250. The indebtedness having exceeded $13,000 on the date of foreclosure, and the proceeds of sale of the security not having exceeded $9,000, the V.A. on demand paid the Bank the full $4,000 guaranty. The V.A. then brought this action against respondent to obtain reimbursement (by way of a right of idemnity under the guaranty contract) for that payment.[3] The court of appeals held that the V.A. had no obligation to pay the guaranty to the Bank and hence has no right of indemnity against respondent.

We agree with the court of appeals that respondent's duty to indemnify the V.A. depends entirely upon the V.A.'s duty to pay the guaranty to the Bank. Thus, although the ultimate question is one of recovery from respondent, the controlling question is that of the V.A.'s liability to the Bank. We shall, therefore, first show that the V.A. was obligated to pay the Bank the full $4,000 guaranty (Point I) and then show that respondent is liable to indemnify the V.A. (Point II).

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[3] See note 2, *supra*. We refer to the Veterans' Administration as the guarantor-plaintiff in this brief only for convenience. Technically, the "United States" is both the guarantor and the party to this action.

I.

THE VETERANS' ADMINISTRATION WAS LIABLE TO PAY THE FULL $4,000 GUARANTY TO THE BANK

A. Introduction: The Question Is Whether State or Federal Law Controls the Amount To Be Credited to the Indebtedness Upon Sale of the Security for Purposes of the Guaranty, a Question of Basic Importance to the Operation of the Loan-Guaranty Program

The question of crucial importance in this case is that of the V.A.'s liability to the Bank, for upon removing the doubt as to that liability depends the continued functioning of the veteran loan-guaranty program. The object of the Servicemen's Readjustment Act of 1944 in providing the guaranty was to induce lenders to extend up to 100% home financing to veterans without the means to make the customary down payment. To that end, as the legislative history (see pp. 44–49, *infra*) makes clear, the guaranty was devised to provide lenders with protection against loss on default fully equivalent to that normally afforded by a down payment. The decision below, as we will show, makes that intended protection to lenders almost entirely illusory and thus destroys the utility of the guaranty in inducing lending institutions to make home-financing loans to veterans (of whom there are about 14 million still eligible for loan benefits[4]) unable to make down payments. It

[4] About 10 million are World War II veterans, who have until July 25, 1962 to use their eligibility; about 4 million are Korean conflict veterans, who have until February 1, 1965. See 38 U.S.C. (1958 ed.) 1803, as extended by Act of July 14, 1960, 74 Stat. 531. Both limits may, of course be further extended.

is that consequence of the decision that makes the question here so important.

1. The decision below is not so much the product of differences over basic legal principles as it is of misunderstanding—not without cause, for the regulations are complex and cumbersome—as to the operation of the guaranty. We do not believe that the court of appeals doubted either (1) that the V.A. regulations implementing the statute (and incorporated into the contract) were fully authorized, or (2) that, if state law should conflict with a provision of the regulations, the regulations would be controlling under the Supremacy Clause. Rather, the court turned to state law to resolve the crucial question (the "credits" to be made against the indebtedness, for purposes of the guaranty, upon the sale of the security) because it believed the regulations did not purport to govern that question. It was in that respect that the court erred, for, as we will show, the regulations do expressly govern the question, and those provisions are, indeed, the essence of the protection afforded by the guaranty.

Our primary purpose in this brief will, therefore, be to clarify the operation of the guaranty under the Act and the regulations and show the impact of the decision below upon the structure thus established. Before turning to a detailed examination of the Act and the regulations, however, we will, in order to clarify the basic issue, state in general terms the extent of our agreement and disagreement with the court of appeals and the point at which we

contend the court overlooked controlling provisions of the regulations. And to show the significance of that error, we will contrast, again in general terms, the operation of the guaranty under the decision below and under the regulations as we construe them.

2. While there is some ambiguity in the court's opinion even on those matters, there is no basic disagreement, we believe, on the following points:

(a) The amount of the guaranty, although originally variable with the indebtedness, becomes fixed as a percentage of the indebtedness *before* crediting against the indebtedness the proceeds of foreclosure, and was in this case $4,000. The percentage feature only reduces the amount of the guaranty as the debt is repaid in the ordinary course. The "loss" upon default is borne in full by the V.A. up to the amount of the guaranty so fixed and is not shared pro rata on the basis of that percentage.

(b) The net amount the lender is entitled to receive (or keep) out of the guaranty is limited to its "loss" measured by the indebtedness remaining after a credit for the proceeds of foreclosure. Whether the full guaranty is paid to the lender immediately upon default and the lender thereafter accounts to the V.A. as subrogee for the proceeds of the foreclosure, or whether the claim for the guaranty is not submitted until after foreclosure and the proceeds are taken into account as limiting the amount payable on the claim, the result is the same. Either way, the net payment to the lender, after final accounting, is limited to what the court of appeals calls the "deficiency"—namely,

> the indebtedness to the lender remaining after a credit for the proceeds of foreclosure.

That is, while we have some disagreement with the way in which the court of appeals stated those propositions, and its mis-citation in doing so of a provision of the regulations, that disagreement is mainly formal and does not go to the heart of the matter.

The point at which the basic difference arises is over how the "credit" for the proceeds of foreclosure is to be determined. We agree with the court that some credit must be made (in determining the *net* amount payable to or retainable by the lender out of the guaranty) for the lender's realization upon the security; the dispute is solely over how that credit is to be determined. As we understand the court of appeals' opinion, it found nothing in the Act or the regulations directly governing that matter and hence concluded that it was necessary to resort to state law to determine the proper credit. Under the Pennsylvania Deficiency Judgment Act, it held, in turn, that a mortgagee who acquires the property at the foreclosure sale must, in effect, credit against the indebtedness, on account of his acquisition of the property, the full balance of the indebtedness due from the borrower, unless, within six months, he petitions the proper court to have a lesser fair market value of the property judicially determined, in which case he must give credit for the fair market value so determined.

We do not here take issue with the court's interpretation of the state law. Its error rather lay in thinking that resort to state law was necessary, for it overlooked the provisions of the V.A. regulations expressly pro-

viding for the amount that "shall be credited to the indebtedness of the borrower on account of" the disposition of the security, for purposes of determining the loss ultimately payable under the guaranty (see pp. 35–42, *infra*). In brief, the regulations provide that, before the sale, the V.A. may specify what amounts to an "upset price" at which the lender may buy in the property and resell it, at its option, to the V.A. If an upset price is so established, the lender must credit against the indebtedness either that amount or the actual proceeds of sale, whichever is greater. If an upset price is not established, then the lender need credit against the indebtedness only the actual proceeds of sale.

The net effect of the regulations is that the lender is required to give credit, before becoming entitled to receive or keep the guaranty, only for the actual cash proceeds of the sale or for the immediately *realizable* value of the property. Thus, the lender is always entitled to the full guaranty unless the lender has otherwise been made whole in cash or cash equivalents (*i.e.*, an option to sell the property at the price for which the lender is required to give credit). Protection against the lender's getting a windfall at the expense of the V.A. is provided by the upset-price mechanism. If the V.A. believes that the realizable value of the property is greater than the unguaranteed portion of the debt, so that the lender's true "loss" is less than the full guaranty, it establishes an upset price for the property greater than the unguaranteed portion of the debt and thus reduces the net amount it must pay under the guaranty. If the V.A. thinks the realizable value of

the property is no greater than the unguaranteed portion of the debt, so that on its valuation the lender's loss will in any event exceed the guaranty, it does not establish an upset price and, if the actual proceeds of sale are less than the unguaranteed portion of the debt, pays the lender the full amount of the guaranty.

3. The impact of the decision below on the guaranty program becomes evident from a contrast of the protection afforded by the guaranty under the regulations (as summarized above and examined in detail *infra*) and under the decision below applying Pennsylvania law to determine the "credits" to be made to the indebtedness for purposes of the guaranty.

Under the regulations, the guaranty is a full substitute for a down payment and affords equivalent protection. With a 30% down payment, the lender advances only 70% of the cost of the house and thus, even if under Pennsylvania law it must accept the house in full payment of the indebtedness, the house stands for only 70% of its original value. Thus, the lender has a 30% "cushion" and suffers a loss only if the realizable value of the house is less than 70% of its original value.[5] The result is the same with a 30% guaranty under the regulations. The worst that can happen to the lender is that it will be paid the 30% guaranty in full and have to accept the house in payment of the remaining 70% of the debt (it cannot be paid less than the full guaranty unless it actually

[5] We are assuming, of course, cases in which the default occurs before the principal of the debt has been significantly reduced. To the extent that the debt is paid off faster than the property depreciates—presumably the usual case—the margin of protection would increase.

realizes or is given an option to realize more than 70% of the debt from the house, in which case it is made whole). In short, under either a 30% down payment or a 30% guaranty, the lender suffers a loss only to the extent that the house has a realizable value, on foreclosure, of less than 70% of its original value.

Under the decision below, on the other hand, the guaranty provides much less protection. Before becoming entitled to the guaranty, the lender must first obtain a judicial appraisal of the "fair market value" of the property and credit that valuation against the indebtedness. If no appraisal is obtained, the house is deemed to have been accepted in full payment of the debt and the debt is discharged, so that the lender receives nothing under the guaranty. And if an appraisal is obtained, the lender is entitled to the guaranty only to the extent that the appraised "fair market value" is less than the indebtedness. At best, therefore, the lender must first accept the house in payment of the debt at its judicially-determined fair market value before it can reach the guaranty at all. That result destroys the value of the guaranty in two ways: first, because there is no assurance that the judicially-determined "fair market value" will be realizable (it is not, like the V.A.'s upset-price valuation, backed up by an offer to buy); and, second, the guaranty can in no event be reached without the time-consuming and expensive procedure of litigating the "fair market value."

The practical operation of statutes like Pennsylvania's is to discourage financial institutions from lending more on a house than the amount for which they are

willing to accept the house in full payment on default; they rely upon the down-payment "cushion," and not on judicial appraisals of the property, to make them whole. Under the guaranty as applied below, however, the lender, having made a 100% loan (*i.e.*, there being no down payment), has no "cushion" and can be made whole only by, first, litigating the "fair market value" of the house and, second, being successful in actually reselling the property at that "value." It is evident, we think, that few, if any, financing institutions would accept a guaranty so remote and contingent in the place of a cash down payment. Thus, the practical effect of the decision below would be to discourage V.A.-guaranteed financing in Pennsylvania and states with similar statutes.* For that reason, the provisions of the regulations requiring only the actual cash proceeds or an upset-price (*i.e.*, immediately realizable) valuation to be credited against the indebtedness, before the guaranty is reached, are not only important but are, indeed, the very essence of the protection afforded the lender by the guaranty. With those provisions, the guaranty is fully equivalent to a down payment; without them it is (at least in Pennsylvania and states with similar laws) almost worthless for practical purposes.

With that preliminary explanation of the question in this case and of its importance, we will turn to a detailed examination of the statute and the complex

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* That is, of 100% loans. Presumably lenders who otherwise obtain an adequate down payment to protect themselves against the operation of such statutes would have no objection to *also* having a V.A. guaranty.

regulations. We will then show (although we do not think that the matter is really in doubt or was meant to be denied by the court of appeals) that the regulations are authorized by the statute and are governing notwithstanding conflicting state laws.

B. The Act and the Regulations Require the Lender To Account Under the Guaranty Only for the Actual Proceeds of Foreclosure Unless the Administrator Establishes an Upset Price

1. THE ACT

The veterans' loan-guaranty program was first established by Title III of the Servicemen's Readjustment Act of 1944, §§ 500, *et seq.*, 58 Stat. 291. That Title was, however, extensively revised by the Act of December 28, 1945, 59 Stat. 626, and it is to the Act as so revised (the relevant parts of which are set forth in Appendix A, pp. 61–64, *infra*) that we will refer in this brief.[7]

The provisions of the Act itself are relatively sparse. Home-financing (and certain other) loans to eligible veterans made by specified classes of lenders (§ 500(d)) in compliance with various requirements[8] were to be "automatically guaranteed by the

[7] Unless otherwise indicated, all references to §§ 500–506 are to the Act as so revised and as in force on the date of the loan in this case (January 12, 1948). With subsequent but relatively minor amendments, the Act may be found at 38 U.S.C. (1952 ed.) 694–694n. The Act was substantially rewritten (though with little change of substance) by the Act of September 2, 1958, 72 Stat. 1203, which codified it as 38 U.S.C. 1801–1824, and it is in that form that it appears in the 1958 edition of the Code.

[8] *E.g.*, maturity and interest rate (§ 500(b)) and limitation of the purchase price to a valuation made by V.A.-designated appraisers (§ 501(3)).

Government * * * in an amount not exceeding fifty per centum of the loan * * * [or] $4,000" (§§ 500(a), 501).[9] Subject to those maximum limitations, "the liability under the guaranty * * * shall decrease or increase pro rata with any decrease or increase of the amount of the unpaid portion of the obligation" (§ 500(b)). Section 506, prescribing the procedure on default, provides:

> In the event of default in the payment of any loan guaranteed under this title, the holder of the obligation shall notify the Administrator who shall thereupon pay to such holder the guaranty not in excess of the pro rata portion of the amount originally guaranteed, and shall be subrogated to the rights of the holder of the obligation to the extent of the amount paid on the guaranty: *Provided* * * * *further,* That (1) nothing herein shall be construed to preclude any forbearance for the benefit of the veteran as may be agreed upon by the parties to the loan and approved by the Administrator; and (2) the Administrator may establish the date, not later than the date of judgment and decree of foreclosure or sale, upon which accrual of interest or charges shall cease.

Those provisions establish the basic nature of the guaranty. By virtue of the pro rata reduction provision (§ 500(b)), the guaranty is originally a variable amount determinable as a percentage of the in-

[9] The "automatic" device, adopted in the 1945 revision, made it possible for lenders to complete the loan before obtaining V.A. approval. After making the loan, however, they were required "forthwith" to report it to the V.A., whereupon, if the loan met the requirements of the Act, a loan guaranty "certificate" would be issued (§ 500(c)).

debtedness outstanding from time to time (the percentage, unless the 50% limit was lower and controlling, being established by the ratio of $4,000 to the original loan (§ 500(a)). However, since the guaranty becomes payable upon default (§ 506), its amount becomes fixed as a percentage of the indebtedness outstanding on that date unless the Administrator—as he is authorized to do by the last proviso of § 506—allows interest and other charges to continue to accrue on the indebtedness, for purposes of computing the guaranty, past the date of default. Since, however, the Administrator is not authorized to postpone the date of computation beyond the date of "judgment and decree" of foreclosure or sale, the proceeds of disposition of the security do not affect the principal amount of the guaranty. That is true because the date of "judgment and decree" of foreclosure or sale always precedes the actual sale, so that the guaranty necessarily becomes fixed before the proceeds of the security are realized and credited against the indebtedness.[10]

But while the principal amount of the guaranty becomes fixed before crediting to the indebtedness the proceeds of foreclosure, it is equally clear that the lender must account to the V.A. for any such proceeds, for the V.A. is expressly subrogated to the bank's rights to the extent of the guaranty (§ 506). That is, the lender is entitled to no more than to be made whole, and if the guaranty and the

[10] For the legislative history showing that Congress plainly intended such an absolute guaranty to the lender, see *infra*, pp. 44–49.

proceeds of foreclosure exceed the indebtedness, the lender must, if the guaranty has already been paid, pay over the excess to the V.A. as subrogee. Similarly, if the proceeds are realized before the guaranty is paid, the excess over the unguaranteed portion of the debt must be set off against the guaranty and the lender would actually be paid, out of the guaranty, only the amount of its net "loss."

2. THE REGULATIONS

The statute omits the complex details of implementing the guaranty program and, instead, expressly delegates to the Administrator authority "to promulgate such rules and regulations not inconsistent with this title * * * as are necessary and appropriate for carrying out" its provisions (§ 504(a)). Thus, while the basic nature of the guaranty is established by the statute itself, the accounting and other details are left to the regulations. The relevant provisions of the regulations as in force on the critical dates,[11] together with their history and the source of each provision, are set forth in Appendix B (pp. 65–74, *infra*), and will be cited here only by section number (§§ 36.4300 *et seq.*).

The regulations being complex and their interrelationships intricate, our exposition of them will perforce be detailed. We will examine them in three steps, considering separately: (a) the determination of the principal amount of the guaranty; (b) the

[11] With one exception (§ 36.4320, see note 19, pp. 36–37, *infra*), the regulations are set forth as they stood on the date of the loan (January 12, 1958).

way in which the proceeds of foreclosure are taken into account; and (c) the amount of the credits to be made against the indebtedness on account of foreclosure.

a. *The amount of the guaranty.*—Like the statute, the regulations view the guaranty as a liability that (subject to authorized postponements) becomes fixed in amount and absolutely payable immediately upon default, with the proceeds of the foreclosure to be taken into account only in a final "accounting" to the V.A. on its resulting rights of subrogation.

The guaranty is originally fixed, as the Act prescribes, as 50% of the original principal amount of the loan, or $4,000, whichever is less (§ 36.4302(a), (b)). Being "reduced or increased pro rata with any reduction or increase in the amount of the guaranteed indebtedness," however, it amounts to a guaranty of "the percentage of the indebtedness corresponding to that of the original guaranty," but not to exceed the original guaranty (§ 36.4302(f)). Thus, the amount of the guaranty in this case was 30.76% (the ratio of $4,000 to $13,000) of the outstanding indebtedness but not to exceed $4,000.

While remaining variable before default, the amount of the guaranty becomes fixed under the regulations (but for postponements later provided for, see *infra*) upon default. "Guaranty", as used in the regulations, is expressly defined to mean "the obligation of the United States, assumed by virtue of Title III of the act, to repay a specified percentage of a loan upon the default of the primary debtor" (§ 36.4301(q)). Thus, the regulations start with the

statutory premise that, except as later adjustments are specifically authorized by the regulations, the guaranty liability becomes fixed in amount and absolute upon the date of default.

The lender is not, however, required to claim the guaranty immediately upon default, but "may at his option, then or thereafter, submit a claim for payment of the guaranty" (§ 36.4316(a)).[12] In practice, in order to avoid the necessity for more than a single accounting (*i.e.*, an initial payment of the guaranty followed by a later accounting for the proceeds of foreclosure), lenders are encouraged to postpone their claims until after foreclosure proceedings are completed and a single, final accounting can be made; in fact, claims are rarely submitted before foreclosure and sale of the security. Because of the practice of postponing the claims, however, it was necessary to allow—as the Administrator was authorized to do under the last proviso of § 506 of the Act—adjustments to be made, in the computation of the amount of the guaranty, for interest or other charges increasing the amount of the indebtedness subsequent to the date of default, while at the same time providing a cut-off date, before realization on the security, at which the amount of the guaranty would become fixed.

[12] Recognizing that most defaults are cured within a relatively short time, the regulations actually permit a claim for the guaranty to be made only after the default has continued for three months (§ 36.4316(a)). The practical effect of that, however, is simply that a "default" is not considered to be operative for purposes of the guaranty until it has continued for three months, and for simplicity we will ignore the three-months requirement in the following discussion and use "default" as meaning a three-month default.

It is that purpose which is served by § 36.4321(a) of the regulations, which provides:

> (a) Subject to the limitation that the total amounts payable shall in no event exceed the amount originally guaranteed, the amount payable on a claim for the guaranty shall be the percentage of the loan originally guaranteed applied to the indebtedness computed as of the date of claim but not later than (1) the date of judgment or of decree of foreclosure, or (2) in non-judicial foreclosures the date of publication of the first notice of sale, or (3) in cases in which the security is repossessed without a judgment, decree or foreclosure the date the holder repossesses the security, or (4) if no security is available or no repossession takes place, the date of claim but not more than 6 months after the first uncured default. Deposits or other credits or setoffs legally applicable to the indebtedness on the date of computation shall be applied in reduction of the indebtedness on which the claim is based. Any escrowed or earmarked funds not subject to superior claims of third persons must likewise be so applied.

That provision, it should be emphasized, relates only to the computation of the principal amount of the guaranty and not to the final accounting to be made after the realization of the proceeds of foreclosure, a matter which, as we will show below, is governed by the following subsections of that section (*i.e.*, § 36.4321 (b) and (c)).[13] Its effect is simply

[13] The use of the language, "the amount payable on a claim for the guaranty shall be," reflects only the basic concept that the lender is absolutely entitled to payment of the

to postpone the date of computation of the amount of the guaranty beyond the date of default to the "cut-off" dates there enumerated (unless the claim is actually filed earlier), so that debits and credits accruing from the date of default up to the cut-off date (primarily interest) may be taken into account in finally fixing the amount of the guaranty (*i.e.*, by increasing or decreasing the indebtedness as a percentage of which the guaranty is fixed). After the cut-off date, in turn, the amount of the guaranty is no longer variable; debits and credits arising after that date, although taken account of in the final accounting discussed under the next heading, do *not* affect the principal amount of the guaranty.

The important aspect of the designated cut-off dates for present purposes is that they are all dates that *precede* the actual sale or other disposition of the security, with the result that the amount of the guaranty is always fixed before, and is not affected by, any credits made to the indebtedness for the proceeds of foreclosure. That is apparent in the case of the date of "judgment or of decree of foreclosure," for the "judgment" of foreclosure invariably precedes the actual sale of the security. Although less obvious, it is also true of the cut-off dates applicable to other kinds of loans, as may be seen by comparing those dates with the events by which the credits arising

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full guaranty at any time after default and that the proceeds of foreclosure do not in theory reduce the amount payable on the guaranty as such but are rather to be accounted for independently on a theory of subrogation. That is, "the amount payable on a claim for the guaranty," as used in § 36.4321(a), *is* the guaranty itself.

from disposition of the security are to be determined (see § 36.4320). That effect of the cut-off dates is essential to the function of the guaranty in absorbing the *full* loss on the loan (up to the amount of the guaranty) rather than simply a *pro rata* share of the loss. For if the proceeds of foreclosure were to be first credited to the indebtedness and the guaranty then determined as a percentage of the remaining indebtedness, the so-called "guaranty" would amount to no more than an agreement to indemnify the bank for the stated percentage of the *loss* itself.[14]

The operation of § 36.4321(a) in this case seems clear beyond dispute. The *judgment* of foreclosure was entered on May 12, 1949, and the sheriff's *sale* was not conducted until June 29, 1949 (R. 14). Thus, it is as of *May 12,* that the regulation expressly requires the computation of the guaranty to be made, and as of that date, since the property had not yet been sold, there were no conceivable credits arising from the disposition of the security either under the regulations *or* under state law.[15] Hence, the court of

[14] It is equally apparent that, if there were not a pre-foreclosure sale cut-off date for the computation of the guaranty, no lender would wait until after foreclosure to submit his claim; he would rather exercise the absolute right given to him by the statute (§ 506) to demand payment of the guaranty—fixed as a percentage of the indebtedness *then* outstanding—immediately upon default, thereafter accounting for the proceeds of foreclosure only by way of subrogation and not in reduction of the amount of the guaranty.

[15] The court of appeals is in error in its statement that the credit required to be given under the Pennsylvania Deficiency Judgment Act arises at "the date of judgment or of decree of foreclosure" (R. 23). By its express terms, that Act becomes applicable only "Whenever any real property has heretofore

appeals' reliance (R. 22–23) on § 36.4321(a) as requiring a credit for the proceeds of foreclosure, for whatever purpose, was misplaced. That error, however, seems to have been of little consequence, for it was counterbalanced by the court's further error in reading § 36.4321(a) as relating, not to the computation of the principal amount of the guaranty, but to the credits to be made on final accounting. The net effect was that the court read § 36.4321(a) as requiring a credit for the proceeds of foreclosure to be made in the final accounting, so that the net amount actually paid to the lender would not exceed its "loss." While that is a misreading of § 36.4321(a), it is (as we will show) essentially the effect of the following subsections ((b) and (c)), so that the total product of the errors amounts simply to a citation of the wrong subsection.

In summary, the regulations make clear that the amount of the guaranty became fixed, in this case, as of May 12, 1949. Since the indebtedness outstanding on that date, after all debits and credits accruing up to that date, exceeded $13,000,[16] the

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been or is hereafter sold, directly or indirectly, to the plaintiff in execution proceedings and the price for which such property has been sold was or is not sufficient to satisfy the amount of the judgment * * *" (§ 1, p. 75, *infra*). See also *Sophia Wilkes Bldg. & Loan Ass'n.* v. *Rudloff*, 348 Pa. 477, quoted in the opinion below (R. 23, n. 5). Here, of course, it was not until the "execution proceedings" on June 29, 1949 (*i.e.*, the sheriff's sale, R. 14), that the property was "sold" to the Bank at a "price" less than the "judgment" entered on May 12, 1949

[16] The stipulation of facts (R. 13–16), although sufficient for the purpose for which it was made (respondent's motion for summary judgment on the basis of the district court's opinion on the pleadings, see R. 12), does not disclose the

amount of the guaranty, so fixed, was the maximum of $4,000.

b. *The step in the accounting at which the proceeds of foreclosure are taken into account.*—That the proceeds of foreclosure do not affect the amount of the guaranty as such does not mean, as we have emphasized, that they are not to be taken into account at all. Nor do we have any basic disagreement with the court of appeals that the *net* pay-

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amount of the indebtedness outstanding on the date of the judgment. Nor should the stipulation that respondent "continued in default" after defaulting on May 12, 1948 (R. 14), be read as implying that the three monthly payments falling due before then were the only payments made by respondent. It appears from the V.A.'s files that respondent in fact made six additional payments after the initial default—reducing the balance of the unpaid principal and accrued interest on May 12, 1949, to slightly under $13,000—and that the total indebtedness exceeded $13,000 only after adding the various other charges which are allowable in the computation of the guaranty (real estate taxes paid by the Bank, attorney's fees, and costs of foreclosure, see § 36.4313, 12 F.R. 8343 (December 12, 1947)). Since none of the relevant items are shown by the present record, the exact amount of the indebtedness on May 12, 1949 cannot be determined here and must be left to further findings by the district court (or a further stipulation) on remand. That is, while we have assumed in this brief (and believe it to be a fact) that the indebtedness on May 12, 1949, exceeded $13,000, we acknowledge that that fact has not yet been established in this action and that it is still open to respondent to challenge it on remand.

The damages assessed by the state court on the judgment of foreclosure ($14,103.47, see note 37, pp. 56–57, *infra*) are not, we may note, controlling for purposes of the guaranty, for they included a 10% attorney's fee which, although assessable against respondent under the terms of the bond and mortgage, is greater than that allowable in the computation of the guaranty under the regulations (see § 36.4313, *supra*).

ment that the lender is entitled to receive (or keep, if the guaranty has already been paid) out of the guaranty is limited to its "loss" measured by the indebtedness less a proper credit for the proceeds of foreclosure—*i.e.*, what the court of appeals called, perhaps somewhat misleadingly, the "deficiency."

The accounting for the proceeds of foreclosure is governed by § 36.4321 (b) and (c) of the regulations, which provide:

> (b) Credits accruing from the proceeds of a sale or other disposition of the security subsequent to the date of computation, and prior to the submission of the claim, shall be reported to the Administrator incident to such submission, and the amount payable on the claim shall in no event exceed the remaining balance of the indebtedness.
>
> (c) The claimant shall be deemed to have received as trustee for the benefit of the United States any amounts received on account of the indebtedness after the date of the claim, from the proceeds of a sale of the security or otherwise, to the extent such credits exceed the balance of the indebtedness unsatisfied by the payment of the guaranty. He shall forthwith pay such amounts to the Administrator to the extent of the debtor's liability to the Administrator as guarantor.[17]

[17] The final subsection, (d), provides for essentially the same kind of accounting, but relates to *debits* (rather than, as do (b) and (c), *credits*) arising after the "date of computation" (*i.e.*, the date the guaranty becomes fixed). Though not directly involved here, we set it out to complete the structure:

> (d) Any allowable expenditures or costs paid subsequent to the date of computation of the claim and

The two subsections serve the same purpose, but relate to different factual situations: (b) applies when the claim for the guaranty is not submitted until after disposition of the security, while (c) applies if the claim for the guaranty was submitted prior to foreclosure (*i.e.*, so that a separate accounting is required to account for the proceeds of foreclosure).

In this case, as we have noted above, the "date of computation" (defined by subsection (a), *supra*), was the date of judgment of foreclosure (May 12, 1949), and the guaranty computed as of that date was $4,000. The sale of the security took place on June 29, 1949, and the claim for payment of the guaranty was filed on July 8, 1949 (R. 14). Thus this case is directly governed by (b)—*i.e.*, it involves a sale of the security "subsequent to the date of computation, and prior to the submission of the claim." In such a case, (b) provides that:

> Credits accruing from the proceeds of [the] sale or other disposition of the security * * * shall be reported to the Administrator incident to [the] submission [of the claim], and the amount payable on the claim shall in no event exceed the remaining balance of the indebtness.

Under that regulation it is clear (as the court of appeals held in substance, though citing the wrong provision) that the Bank was entitled to receive payment of the full $4,000 guaranty only if its "loss" on the

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before accounting to the Administrator, and accrued interest from the date of claim to the date of sale, may be deducted by the holder from the proceeds of the sale of the security, or may be included in the accounting to the Administrator on such loan.

loan—measured by the outstanding indebtedness on July 8, 1949, less the proper "credit" for the proceeds of foreclosure—exceeded $4,000.

But while the result, at least for purposes of this case, is the same, the court of appeals' description of it as meaning that the "deficiency" is "the amount and the only amount which may be paid by the V.A. under the guaranty" (R. 21) is not entirely accurate. In the first place, the lender is always entitled to demand payment of the full guaranty at any time after default and need not wait until after foreclosure. And if the full guaranty is paid prior to sale of the security, the lender, although required thereafter to account to the V.A. for the proceeds of foreclosure (under (c) above), does so essentially on a theory of subrogation—*i.e.*, accounting as a "trustee" to the V.A. as the subrogee of the lender's rights to the security—and not on a theory of repaying a part of the "guaranty" as such. That is also essentially the theory of the accounting even when the claim is not submitted until after foreclosure. Under (b), the "claim" is still for the full guaranty and the proceeds of foreclosure are simply to be "reported" to the V.A. "incident to" the submission of the claim. The limitation on the amount actually to be paid the lender to the remaining indebtedness is, conceptually, not the result of reducing the amount of the "guaranty" to which the lender is entitled but rather the result of setting off against each other the lender's right to the guaranty and the V.A.'s rights of subrogation. The absolute nature of the guaranty and of the lender's right to its payment is not changed by the fact that

the claim is postponed until after foreclosure. The rights—the lender's rights, which arose upon default, to payment of the full guaranty, and the V.A.'s rights as subrogee to the extent of the guaranty—remain the same, but they are settled in a single accounting, so that only the net balance due the lender need be paid.

For purposes of this case, however, it is sufficient to say that the V.A. was liable to pay the Bank no more than the amount of the indebtedness remaining after the "Credits accruing from the proceeds of [the] sale or other disposition of the security." That does not differ in substance from the holding of the court of appeals, and the real question in dispute is how those "credits" are to be determined.

c. Determination of the amount of the "credits" arising from sale of the security.—To determine the amount of the "credits" to be made against the indebtedness due the lender upon sale of the security, the court of appeals turned to state law, and held that under the Pennsylvania Deficiency Judgment Act (Appendix C, pp. 75–76, *infra*) the Bank, as a purchasing mortgagee, was required to give credit for the full amount of the remaining indebtedness unless it filed a petition in a state court within six months of the sale to have the "fair market value" of the property determined (in which event it would be required to give credit for that "fair market value"). Since the Bank did not file such a petition within six months, the credit it was required to give at the date of sale (the full debt) was never reduced and hence, in the court's view, there was no unsatisfied indebtedness either at

the date of the claim or thereafter which the V.A. could be required to pay on the guaranty.

The court turned to state law, it seems evident from its opinion, only because of its belief that neither the Act nor the regulations provided expressly for the "credits" to be made on account of the sale of the security.[18] While we would question the result even on that assumption, the complete answer is that the regulations *do* expressly provide for the "credits" to be made. Those provisions are found in § 36.4320 of the regulations, which set forth in precise detail the amounts "which shall be credited to the indebtedness of the borrower on account of the value of the security" upon its disposition under each of the various kinds of loans and foreclosure procedures.

The regulations providing for the credits to be made on disposition of the security are detailed and complex and are set forth in Appendix B (§ 36.4320, *infra*, pp. 68–72). Those directly governing the sale in this case provide:[19]

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[18] *E.g.*, "We further agree that the terms of that guaranty are governed by the Servicemen's Readjustment Act * * * and the regulations" (R. 20); "An examination of the Act fails to disclose any attempt on the part of Congress to supplant state law for determining the amount of the deficiency * * *. The regulations * * * make it equally clear * * * that state law was intended to be followed in determining the amount of the indebtedness to which the guaranty related" (R. 21); "* * * we are convinced that federal law requires a referral to the state law in this instance" (R. 22).

[19] § 36.4320 is the only relevant provision of the regulations that was significantly altered between the date of the loan (January 12, 1948) and the date of the foreclosure and accounting proceedings (May 12–July 8, 1949). We have set it forth here and in the body of the Appendix as it was in effect at foreclosure (*i.e.*, as revised by 13 F.R. 7739–7741, December 15,

§ 36.4320 *Sale of security.* (a) Upon receipt by the Administrator of notice of a judicial or statutory sale, or other public sale under power of sale contained in the loan instruments, to liquidate any security for a guaranteed or insured loan, he may specify in advance of such sale the minimum amount which shall be credited to the indebtedness of the borrower on account of the value of the security to be sold, subject to the provisions of subparagraphs (1), (2), (3) and (4) of this paragraph:

(1) If a minimum amount for credit to the indebtedness has been specified in relation to a sale of real property and the holder is the successful bidder at the sale for an amount not in excess of such specified amount the holder shall credit to the indebtedness the amount so specified. The holder thereupon may retain the property or not later than 15 days after the date of sale advise the Administrator of his election to convey or transfer

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1948). We have also, however, set it forth in the margin in the Appendix (pp. 68–70, *infra*) as it stood on the date of the loan. From a comparison of the two versions, it may be seen that, although the section was rewritten to spell out in more detail the procedure to be followed in a greater variety of circumstances, there was no change of substance that would affect the result in this case (compare (b)(2) of the original section with (a)(1) and (4) of the revised section). Since the change affected no substantial rights, the regulation in effect on the date of the foreclosure proceedings governed those proceedings by force of § 36.4300, which makes the regulations applicable when published "to such loans previously guaranteed or insured to the extent that no legal rights vested thereunder are impaired." Thus, although the result would be the same under either version, it is the revised § 36.4320 that is technically controlling, and we have accordingly stated the discussion in this brief in the language of that, rather than the earlier, provision.

> the property, or the rights thereto derived through the sale, to the Administrator.
>
> * * * * *
>
> (4) If a minimum amount has not been specified by the Administrator under subparagraph (1) or (2) of this paragraph, the holder shall credit against the indebtedness the net proceeds of the sale * * *.
>
> * * * * *
>
> (g) In the event a holder elects to convey or transfer the property to the Administrator pursuant to paragraph (a) (b) or (c) of this section, the consideration to be paid by the Administrator in return for the property shall be the specified amount: * * *.

By their express terms, therefore, the regulations direct that if, as here, "a minimum amount has not been specified by the Administrator" the lender need credit against the indebtedness only the actual proceeds of the sale (§ 36.4320(a)(4)).

The key to the regulations is to be found in the "specified minimum amount" provisions and in the purpose for which the prescribed credits are to be used. The "specified minimum amount" operates, essentially, as an "upset price": it is the price at which the lender is directed (if necessary) to buy in the property and at which, in turn, it is entitled (unless it chooses to keep the property itself for that credit) to resell it to the V.A. If, as is usually the case when an upset price is established, the lender elects to convey the property to the V.A., the V.A. must then dispose of the property on its own account. The V.A., of course, has no interest in trading in real estate

on its own account as such, and hence it has no reason to establish an upset price unless to do so will result in reducing its net liability under the guaranty (*i.e.*, in the final accounting under § 36.4321 (b) and (c), discussed above). Since, in turn, the only credit against the indebtedness that will reduce that liability is one that exceeds the unguaranteed portion of the debt, it follows that there is no purpose in establishing an upset price unless it is one that exceeds that amount. Accordingly, the V.A. establishes an upset price only if, on its appraisal, the property has a realizable value in excess of the unguaranteed portion of the debt.[20] If its realizable value is less than that, it does not set an upset price and requires the lender to give credit only for the actual proceeds. Not being willing itself to underwrite (by an offer to buy) a valuation greater than the unguaranteed portion of the debt, the V.A. can hardly require the bank to give credit for more than that amount (unless, of course, the property is actually sold on foreclosure for more), and how *much* less than that the actual proceeds turn out to be is of no concern to the V.A., since its net liability will still be for the full guaranty.[21]

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[20] Veterans' Administration Manual M4A-8, Part IV, ¶ 2.16, provides:

> In all cases involving guaranteed loans, the amount specified will be an amount equal to the appraised value of the property as determined by the latest appraisal or a sum not exceeding the total debt plus foreclosure expenses, whichever is less, except where the amount due the holder after crediting the amount paid or payable under the guaranty exceeds such appraised value, in which case no amount will be specified.

[21] In this case, with an indebtedness exceeding $13,000 and a guaranty of $4,000, the V.A. would be liable for the full

From the point of view of the lenders, the fact that they are required, upon foreclosure, to give credit only for the actual proceeds, unless an upset price is established, is the heart of the protection afforded them by the guaranty. Since they are required to give credit only for amounts actually realized or immediately realizable (under the upset-price option to resell to the V.A.), they are assured of receiving the full guaranty unless they have otherwise been made whole in cash or cash equivalents. And it is precisely because, and only because, the foreclosure-accounting provisions do operate in that way that the guaranty affords, as it was intended to afford, protection fully equivalent to that provided by the usual down payment.

The provisions of § 36.4320 prescribing the credits to be made against the indebtedness for the proceeds of foreclosure, for purposes of the final accounting under § 36.4321 (b) and (c),[22] are thus the very essence of the guaranty system. It is by them that protection to lenders equivalent to a down payment is assured and it is by them (the upset-price mechanism) that protection to the V.A. against windfalls to

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guaranty so long as the credit for the proceeds of foreclosure did not substantially exceed $9,000. The V.A. was unwilling to offer (by an upset price) more than that amount for the property and, since it made no difference how much less than that was credited (whether $250 or $9,000), it had no interest in fixing an upset price below that amount. It accordingly allowed the Bank to bid in the property for a nominal price and assumed full liability on the guaranty.

[22] That is, of course, the only reason for § 36.4320 being in the regulations at all; for an express recognition of that purpose, see § 36.4320(g).

the lenders, at its expense, is assured. Contrariwise, without those express provisions and with such a crucial matter being left to state law,[23] the guaranty would, as the decision below demonstrates, be of almost negligible value (see pp. 18–21, *supra*).

The application to this case of the Act and regulations, as we have analyzed them and as they have consistently been applied by the Administrator throughout the 16 years since the adoption of the Act,[24] may be summarized as follows: The $13,000 loan by the Bank to respondent was automatically guaranteed by the V.A. to the extent of 30.76% (the ratio of the $4,000 maximum to the original loan) of the outstanding indebtedness (§ 500(a); § 36.4302(a)). The Bank was entitled to demand payment from the V.A. at any time after August 12, 1948 (three months after the default on May 12, 1948) (§ 506; § 36.4316(a)). It did not do so prior to the date of judgment of foreclosure (May 12, 1949), and hence the amount of the guaranty became fixed as 30.76% of the indebtedness outstanding on that date (which, being in excess of $13,000, fixed the guaranty at the maximum of

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[23] For an express recognition that the very purpose of § 36.4320 was to supersede state law governing the credits required to be given on foreclosure, see § 36.4320(d), providing that if the amount bid by the lender for the property is a minimum bid "required under applicable State law", no credit at all need be given for purposes of the guaranty—*i.e.*, the amount payable "under the guaranty shall not be subject to any adjustment by reason of such bid."

[24] See, *e.g.*, Decisions of the Administrator of Veterans' Affairs, No. 589 (September 25, 1944), vol. 1, p. 1039; *id.*, No. 625 (January 22, 1945), vol. 1, p. 1154.

$4,000) (§ 506 (proviso); § 36.4321(a)). Thereafter, on June 29, 1949, the Bank purchased the property at the sheriff's sale for $250. No upset price having been established by the V.A., the Bank was required to credit against the indebtedness, for purposes of the final accounting on its claim for the guaranty (filed on July 8, 1949), only the actual proceeds ($250) (§ 36.4320(a)(4)). Since, after taking into account that credit, the remaining balance of the indebtedness exceeded $4,000, the Bank was entitled to payment of the full $4,000 guaranty (§ 36.4321(b)).

C. The Regulations Are Authorized by the Act and Control Over Conflicting State Law

From the preceding examination of the regulations, it is apparent that, on the question of the credits to be made against the indebtedness upon the sale of the security, for purposes of the guaranty, the regulations are in direct conflict with Pennsylvania law as construed by the court of appeals. The regulations require credit to be given only for the actual proceeds unless the V.A. establishes an upset price. Under them, since no upset price was established, the required credit in this case was only the nominal one of $250, leaving an indebtedness in excess of $4,000, and thus entitling the Bank to payment of the full $4,000 guaranty in the final accounting under § 36.4321(b). Pennsylvania law, as construed by the court of appeals, requires a credit to be given—for purposes of determining the liability of guarantors as well as of the debtor—equal to the full amount of the indebtedness (unless, as was not done here, a lesser "fair market value" is judicially determined).

Under that view, the debt had been fully satisfied at the date the claim was filed and hence, in the court's view, the Bank was entitled to nothing on its guaranty.

Once that direct conflict is recognized, we do not believe there can be any doubt about its resolution. The court of appeals, as we have noted, turned to state law, not because it doubted the controlling force of the regulations, but only because of its belief that the regulations did *not* provide for the matter but were intended to leave it to state law. We will, however, show briefly that those provisions of the regulations are fully authorized by the statute and, therefore, are controlling over state law under the Supremacy Clause.

1. That the regulations are *consistent* with the statute has already been demonstrated in the preceding detailed examination of the statute and the regulations.[28] It seems equally clear that the foreclosure-credit provisions were "necessary and appropriate for carrying out the provisions" of the Act (§ 504), for it is evident that provisions governing the accounting for the foreclosure proceeds were essential

[28] There is perhaps one formal inconsistency, not relevant here, in the requirement of § 36.4316(a) that the default have continued for three months before a claim for the guaranty may be made, while § 506 of the Act literally authorizes claims immediately upon "default." The statute was hardly meant, however, to be applied so strictly, and there is little doubt that the powers given the Administrator to implement the Act were broad enough to allow him to define "default" to mean a *substantial* default—*i.e.*, one that has continued for three months.

to a final settlement between the lenders and the V.A. on their respective guaranty and subrogation rights. No more is required for the regulations to be fully authorized by the express terms of § 504.

Not only, however, were the foreclosure-credit provisions of the regulations (*i.e.*, § 36.4320) "necessary" in the sense that *some* rule was necessary, but the specific rule adopted by the regulations was itself essential to the purposes of the Act. We have shown above (pp. 18–20, *supra*) that the method of accounting adopted—in which the lender must account only for cash received or for cash equivalents (an upset-price valuation supported by an offer to buy) before becoming entitled to payment of the guaranty—is essential if the guaranty is to afford protection equivalent to that afforded by a down payment (*i.e.*, so that the security stands for, say, only 70% of the original purchase price, rather than 100%). And that it was the purpose of Congress to provide that degree of protection seems unquestionable.

The general objective of the Servicemen's Readjustment Act, passed (on June 22, 1944) in the closing days of World War II, was to aid returning veterans to reestablish themselves in civilian life. Title III (guaranteeing loans for the purchase of farms and business property as well as of homes) sought to achieve that end by making credit available to veterans without means to meet the usual financing requirements. The guaranty, said the House committee in reporting the bill,[26] "is intended to take

[26] S. 1767, 78th Cong. The original Senate version of the bill proposed direct loans by the government. It was the

the place of what is normally required as a down payment." H. Rep. 1418, 78th Cong., 2d Sess., pp. 3, 9.

The 1944 Act, as we have noted, was extensively revised in 1945, and it is to the revised Act that we have referred in this brief.[27] The main change that is relevant here was the addition of § 506, expressly making the guaranty payable upon default (see pp. 22–24, *supra*), a matter that had been left to implication by the original Act.[28] The history of that provi-

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House version, guaranteeing loans made by private financing institutions, that was finally adopted. H. Rep. 1624, 78th Cong., 2d Sess., p. 22 (conference report).

[27] The major change was the elimination of the requirement of the original Act that V.A. approval be obtained *prior* to the disbursement of the loan. The 1945 amendments made the guaranty "automatic," so that lenders could themselves determine the eligibility of loans under the Act and be entitled to the guaranty so long as the loans (reported to the V.A. after disbursement) in fact complied with the requirements of the Act and the regulations. While numerous other changes were also made (*e.g.*, the addition of an optional "insured" loan system and a liberalization of the amount of the guaranty and of the time within which it could be used), none of them affected the basic nature of the guaranty as established by the original Act, and the only change relevant here is that discussed in the text.

[28] The implication was supplied by the presumption that Congress intended the guaranty to have the traditional incidents of the guaranty relationship. On that basis the Administrator had construed the original Act as having the same effect as was later made express by § 506—*i.e.*, with the guaranty becoming fixed and payable immediately upon default. See 38 C.F.R. (1956 ed.) 36.4034–36.4035 (regulations applicable under the original Act, first issued in 1944, 9 F.R. 12654); see also Decisions of the Administrator of Veterans' Affairs, No. 589 (September 25, 1944), vol. 1, p. 1039.

sion reconfirms the purpose to make the guaranty "absolute" and a full substitute for a down payment.

As originally reported by the House committee and passed by the House, the 1945 revision bill (H.R. 3749, 79th Cong.) would have added a new section (there numbered § 505) providing that, when a default occurs "and after suit or foreclosure and sale the deficiency is determined," the V.A. "shall pay to the lender its guaranty not in excess of $2,000 [the former maximum] and not in excess of the deficiency." See H. Rep. 926, 79th Cong., 1st Sess., pp. 3–4, 10. One difference between that proposal and § 506 as finally adopted was, of course, that it would have made the guaranty payable only after completion of the foreclosure proceedings, rather than immediately upon default. The proposal also, however, had another (and apparently unintended) implication: since § 500(b) of the Act provided that the amount of the guaranty would decrease pro rata with reductions of the indebtedness, postponing the fixing of the guaranty until after foreclosure implied that the guaranty would be reduced to a percentage of the deficiency itself, so that it would operate only as a pro rata loss-sharing indemnity contract.[29]

At the Senate hearings, General Omar Bradley, then Administrator of the V.A., pointed out that ef-

[29] That that was not the result intended seems evident from the provision of the proposed § 505 that the lender, after foreclosure, would be paid the guaranty but "not in excess of the deficiency", for the guaranty could never be in excess of the deficiency if it were itself fixed as a percentage of the deficiency. That result nevertheless seemed the logical implication of reading § 500(b) (the pro rata reduction provision) together with the proposed § 505.

fect of the House bill and strongly opposed its adoption:

> * * * Literally, the guaranty provision [of the original Act] was intended to provide what ordinarily is required as a down payment * * *. In other words, the guaranty took the place of the purchaser's equity. It must be remembered, too, that the governmental security provided was a guaranty and not an indemnity. In other words, the Government, to the extent as to the amount guaranteed, absorbs the loss instead of sharing it with the creditor. * * *
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> * * * * *
>
> While the language is not clear that what is called a guaranty is intended as an indemnity, the language of section 505 of the bill appears to spell out the fact that the loss would be shared by the creditor and the Government in the ratio of the amount of the guaranty to the amount of the loan. * * *
>
> * * * * *
>
> * * * If an indemnity only is intended, I do not believe lending institutions would find the loans attractive * * *.[30]

The Senate committee then reported out a revised bill which, *inter alia,* omitted § 505 of the House bill, explaining that its bill "preserved the guaranty principle of the existing act instead of the House provision, which is in effect a contract of indemnity, with

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[30] *Hearings before Subcommittee of the Senate Committee on Finance on H.R. 3749*, 79th Cong., 1st Sess., pp. 31–33. Representatives of the banking industry similarly testified that the guaranty would not, under the House bill, be an acceptable substitute for down payments (*id.* at 169–170, 349–350).

the lender and the Government sharing the loss pro rata." S. Rep. 698, 79th Cong., 1st Sess., p. 4.

In conference, neither the House bill (containing the "deficiency" procedure) nor the Senate bill (containing no provisions expressly governing the procedure on default) was adopted. The managers agreed to an entirely revised version of Title III which sought to compromise the differences. It is that version that was finally enacted and in which § 506 as it now reads (*i.e.*, with the guaranty payable immediately on default) first appeared. The separate statement of the House managers, appended to the conference report, contains the somewhat misleading comment that § 506, "relating to procedure on default, is retained substantially as in the House bill." H. Rep. 1449, 79th Cong., 1st Sess., p. 17. That, of course, is hardly a correct statement read literally, and it apparently meant only that the principle of the House bill (in expressly providing for the procedure on default) was adopted, and that the provision as rewritten—to meet the Senate objections and to remove the unintended implications of the original wording—was "substantially" what the House had intended.

While the meaning of § 506 is clear enough on its face, the history of that provision is significant, we think, in showing Congress' concern that the absolute protection afforded by the guaranty, fully equivalent to that given by a down payment, not be weakened. It was expressly on that basis that objection was made to the House provision, and it seems evident that it

was because of those objections that the provision was revised to avoid that consequence.[31]

2. The provisions of the regulations governing the accounting for the proceeds of foreclosure (specifically, § 36.4320) being expressly authorized by the Act and essential to the fulfillment of the very purpose of the federal program, they are plainly controlling over conflicting provisions of state law. *McCulloch* v. *Maryland,* 4 Wheat. 316, 427; *Testa* v. *Katt,* 330 U.S. 386. Additionally, the regulations were incorporated by reference into the guaranty contract with the Bank both by operation of law (§§ 500(b), 504; § 36.4334) and by the express terms of the Home Loan Report submitted by the Bank in requesting a loan guaranty certificate to be issued (R. 15 (bottom)). "The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties * * * all present questions of federal law not

[31] That history also shows the error of the court of appeals' reliance upon the language quoted by it from the statement of the House managers appended to the conference report: "In the event the veteran defaulted * * * and after suit on foreclosure and sale *the deficiency was determined*, then * * * the Administrator would pay to the lender its guaranty * * * not in excess of *the deficiency*" (R. 21; emphasis supplied by the court). That statement was a part of the managers' summary of what the *House bill* had provided and was an almost verbatim paraphrase of § 505 of that bill. H. Rep. 1449, *supra*, at p. 15. Not only was that provision not adopted but, as we have shown, it was not adopted for the very reason that it had the implications the court of appeals now attributes to the House managers' paraphrase of it.

controlled by the law of any State." *United States* v. *Allegheny County*, 322 U.S. 174, 183; see also *Wissner* v. *Wissner*, 338 U.S. 655; *Clearfield Trust Co.* v. *United States*, 318 U.S. 363.

II.

RESPONDENT IS LIABLE TO INDEMNIFY THE VETERANS' ADMINISTRATION FOR ITS REQUIRED PAYMENT OF THE GUARANTY

The court of appeals agreed "that an independent indemnity relationship was created by the veteran's application for guaranty of his loan" (R. 20). Since, however, the "amount payable under the indemnity agreement * * * is limited to the amount which the V.A. under the statute is *required* to pay on its guaranty" (R. 21), the court denied recovery of indemnity because of its holding that the V.A. was not required to pay the guaranty to the Bank. Thus, the court of appeals did not disagree that respondent would be liable for indemnity if, as we have tried to show, the V.A. *was* required to pay the guaranty. We will, however, briefly demonstrate the basis for respondent's liability.

1. The Act as in force on the date of the loan contained no express mention of the veteran's indemnity obligations. That reflects, however, only the assumption, particularly evident in the original Act—which equally omitted any reference to such basic incidents as the time of payment and the right of subrogation—that the consequences of a guaranty were so well defined by the common law as to require no specification. And just as § 506 was added in 1945 expressly to

recognize the V.A.'s liability to make payment immediately upon default and its resulting rights of subrogation (see pp. 45–49, *supra*), so later changes (after the date of the loan here) have expressly recognized the existence of the veteran's indemnity liability. Thus, in 1952, in adding a provision dealing with the effect of prior guaranteed loans in determining a veteran's remaining entitlement, Congress distinguished loans on which the V.A. had incurred a liability or loss "unless * * * the resultant indebtedness of the veteran to the Government shall have been paid in full." § 500(a) (clause 2(b) of second sentence), as amended by Act of July 16, 1952, 66 Stat. 682, 38 U.S.C. (1952 ed.) 694(a). Similarly, in 1956, Congress again recognized the veteran's personal liability *to the Administrator* (*i.e.*, indemnity liability) by providing a method whereby, upon resale of the property to an approved purchaser, the veteran might be relieved "of all further liability to the Administrator on account of such loan (including liability for any loss resulting from any default of the transferee * * *)." § 506(b), as added by Act of August 1, 1956, 70 Stat. 914, 38 U.S.C. (1952 ed., Supp. V) 694g(b).

2. The regulations, of course, have from the beginning provided for the veteran's duty to indemnify the V.A. for any guaranty liability incurred. The provision in force at the time of the loan in this case, and hence incorporated by reference into the guaranty application made by respondent,[22] provided:

[22] See R. 13, 15 (bottom of page), 16. Since the veteran's entitlement to a maximum total amount of guaranties is

§ 36.4323 *Subrogation and indemnity.* * * *
(e) Any amounts paid by the Administrator on account of the liabilities of any veteran guaranteed or insured under the provisions of the act shall constitute a debt owing to the United States by such veteran.

The validity of that regulation—stating no more than the universal right of guarantors to indemnity [33] and simply making express a liability that Congress in later amendments (*supra*) has assumed to have been a necessary consequence of the guaranty—has never been, and cannot well be, questioned.[34]

Nor can there be any doubt that the regulation is, by its terms, fully applicable here. Respondent, by emphasizing "liabilities of [the] veteran," seems to suggest that the regulation can be read as applicable

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personal to him and may be used by him on such loans as he chooses, he must, of course, request the use of his entitlement on a particular loan even though the guaranty is otherwise "automatic". The "automatic" feature—the major change made by the 1945 revision—was intended simply to permit lenders to process loans without prior V.A. approval and then report them to the V.A. with the veteran's certificate of eligibility, on which, in turn, the amount of entitlement used is to be noted. See § 500(c); § 36.4303(a).

[33] See, *e.g.*, *Restatement of the Law of Security*, § 104; Stearns, *Law of Suretyship*, §§ 11.35, 11.37, 11.39, 11.40 (1951 ed.).

[34] See, *e.g.*, *McKnight* v. *United States*, 259 F. 2d 540 (C.A. 9); *United States* v. *Gallardo*, 154 F. Supp. 373 (N.D. Cal.); *United States* v. *Jones*, 155 F. Supp. 52 (M.D. Ga.); *United States* v. *Henderson*, 121 F. Supp. 343 (S.D. Iowa), in all of which (as in numerous district court judgments entered without opinions) the veteran was held liable for indemnity. The V.A. has processed a very large number of claims against veterans in circumstances comparable to those involved here. Many of these claims have been collected from other monies due the veteran, and many suits have also been brought.

only to amounts paid by the V.A. in discharge of the *then-existing* liabilities of the veteran to the lender; that at the time of payment of the guaranty in this case (*i.e.*, after the Bank's purchase of the property at the sheriff's sale) the respondent's independent liabilities to the Bank had been released by operation of Pennsylvania law; and hence, even if the V.A. was still obligated by its guaranty contract to pay the Bank, it did not do so in discharge of *respondent's* liabilities, and respondent is therefore not liable for indemnity under § 36.4323(e) (see Br. in Opp. 5). That argument, if it was in fact intended to be made by respondent,[35] is plainly unsound. The regulation requires that amounts paid by the V.A. *"on account of the liabilities* of any veteran *guaranteed"* under the Act be repaid by "such veteran." The "liabilities," not the veteran, are "guaranteed," and a duty of indemnity arises for all amounts paid "on account of" any liabilities *guaranteed*—in short, any amounts paid on account of a guaranty.[36] The references to the

[35] We doubt, however, that that is what respondent meant, for he seems to have viewed the V.A.'s liability to the Bank as being dependent upon the respondent's liability, so that the two questions were not separated. A similar ambiguity arises from the district court's emphasis on the "liabilities" of the veteran (R. 11).

[36] That meaning of the regulation is confirmed by its history. The regulations issued in 1944 under the original Act (9 F.R. 12655, 38 C.F.R. (1956 ed.) 36.4043) provided:

> § 36.4043 * * *. (a) Any amounts paid to the creditor by the Administrator pursuant to the guaranty shall constitute a debt due to the United States by the veteran on whose application the guaranty was made * * *.

The change of the regulation to its present form was occasioned by the addition to the Act, in the 1945 revision, of an alterna-

"veteran" are only to identify the original obligor and hence indemnitor, and it is essentially immaterial whether the payment, made "on account of" the liabilities originally guaranteed on the veteran's behalf, is also made "in discharge of" a liability of the veteran that persisted to the date of payment. Any other interpretation would unreasonably attribute to the regulations a purpose to depart from the ordinary consequences of the "guaranty" relationship as that term is universally understood and as it was presumably used by Congress. So construed, indeed, the regulation would be of doubtful validity, for the evident purpose of Congress was only to improve the *credit* of veterans by standing behind their undertakings, and not to authorize the V.A. to relieve veterans of their liabilities either to the lender or to it as the guarantor.

That interpretation of the regulation would in any event avail the respondent nothing, for the V.A.'s liability to pay the guaranty to the Bank in fact became fixed at a time when respondent himself remained fully liable to the Bank. As we have shown in Point I, the liability to pay the guaranty arose upon default and became finally fixed (since no prior claim was made) on the date of the judgment of foreclosure, May 12, 1949 (*i.e.*, the "date of computation" under § 36.4321(a)). It was not until the Bank purchased the property at the sheriff's sale on June 29, 1949

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tive system of insuring loans, which made it necessary to reword the indemnity regulation to cover losses incurred on "liabilities * * * guaranteed *or insured*" under the Act. There was plainly no purpose to change the nature or scope of the indemnity obligation.

(R. 14), that respondent was released by Pennsylvania law from his liability to the Bank (see note 15, pp. 29–30, *supra*). Thus, the V.A.'s liability to pay the guaranty became fixed and certain at a time when respondent *was* legally obligated to the Bank, and it is surely of no consequence that the actual transfer of funds did not occur until later.

3. Turning from the express terms of the regulations to the broader considerations of policy, we think there is equally no merit in the court of appeals' conclusion "that Congress never intended to deprive veteran-mortgagors of the benefits of Acts such as the Pennsylvania one that is clearly ameliorative. Certainly there was no intention to put these individuals in a worse position than nonveteran-mortgagors" (R. 25).

In the first place, the Pennsylvania law purports only to relieve debtors and guarantors of their respective obligations *to the lender* and in no way affects the independent obligations of the debtor and the guarantor to each other (see §§ 6, 7, 9). By operation of Pennsylvania law, respondent was admittedly relieved of his liabilities to the Bank, and our position in no way deprives him of that benefit. The only remaining question is whether Congress "intended" to deprive *the V.A.* as guarantor of the benefit of the Pennsylvania law in purporting to release *it* from liability to the Bank, for it is only through releasing the guarantor from its liability to the lender that the Pennsylvania law has any effect upon the debtor's (the veteran's) resulting liabilities to the guarantor (the V.A.). Thus to frame the question as one of

depriving veterans of "benefits" under state law is to confuse the issue, for the very "benefit" intended by Congress to be conferred upon veterans—enabling them to obtain loans without down payments—depends, as we have shown, upon the V.A.'s liability on the guaranty *not* being released by operation of state law."

Secondly, it is not true that our interpretation places veterans "in a worse position than nonveteran-mortgagors" (R. 25). A nonveteran borrower could not have obtained the loan in the first place without a down payment more or less equivalent to the amount of the guaranty ($4,000), and nothing in the Pennsylvania law would enable him, upon foreclosure and sale, to recover that down payment or to require the lender to credit him with the "fair market value" of the property. The lender would

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[37] It equally begs the question to assert, as does respondent, that "Congress never intended that a lender * * * should reap the benefit of receiving $14,500 on a loan of $13,000 while at the same time, the United States proceeds against the veteran for an indemnity for the $4,000 guaranty payment" (Br. in Opp. 7). The $14,500 proceeds were the result simply of the Bank's having been successful in reselling the property, on its own account, for $10,500 (R. 14), and under no possible interpretation either of federal or state law is the lender accountable for the profit or loss realized by it on resale. The question is solely that of the credits to be made for the proceeds of the *sheriff's sale*, and whatever those credits may be (actual proceeds, upset price, or a judicially-determined "fair market value"), the purchasing mortgagee (or, for that matter, any other purchaser) will inevitably realize either a profit or loss on resale.

In reply to respondent's implied assertions that the Bank realized a windfall on resale of the property, however, we may point out that the Bank in fact suffered a net *loss* of $337.24

be entitled to keep the property, whatever its actual value, in payment of the remaining indebtedness (*i.e.*, 70% of the original cost), and need obtain a judicial appraisal, and credit that value, *only* if he seeks to obtain a deficiency judgment.[38] Thus, on the facts here, a nonveteran borrower would have lost both his $4,000 down payment and his result-

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on the loan, even after payment of the full guaranty. That result is arrived at by the following computation based upon information appearing in the V.A.'s files:

Judgment entered on May 12, 1949 (including attorney's fees allowable under bond and mortgage)		$14,103.47	
Interest to date of sheriff's sale (June 29, 1949)		77.60	
Costs of sheriff's sale		144.09	
Total charges			$14,325.16
Proceeds of resale	$10,500.00		
Plus apportionment of real estate taxes	24.97		
Less: broker's commission	(525.00)		
revenue stamps	(11.55)		
acknowledgment of deed	(0.50)		
Net proceeds of resale		$9,987.92	
Payment of guaranty		4,000.00	
Total proceeds			13,987.92
Bank's net loss on loan			(337.24)

While those figures (being ultimately irrelevant) do not appear in the record in this case, the Court can take judicial notice of the judgment (entered on May 12, 1949, Court of Common Pleas of Montgomery County, Pennsylvania, No. 351, April Term, 1949), and the other amounts are in evident conformity with standard charges (*e.g.*, the 5% broker's commission).

[38] Moreover, even if the lender petitions to have the "fair market value" determined, that value can never exceed the net indebtedness (see § 6). The function of the appraisal is only to fix the amount of the *deficiency*, if any, still collectible from the debtor, not to establish a *surplus* repayable to the debtor.

ing equity in the property. Respondent is ultimately in no different position. The guaranty operates, as we have stressed throughout this brief, essentially as a deferred down payment. Because the credit of the United States stood behind him to the extent of $4,000, respondent did not have to put up that (or a roughly equivalent) amount to begin with, and he can hardly complain that because he, unlike the nonveteran borrower, is able to defer his payment of that amount he is in a worse position when, having defaulted and allowed the property to be sold for less than 70% of its original cost, he has to pay the same amount that the nonveteran would already have paid and lost.[39]

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[39] In an important respect, indeed, the veteran is considerably better off than his nonveteran counterpart. In addition to being able to defer his "down payment", the *amount* of the "down payment" that he risks losing upon default is, because of the pro rata reduction feature of the guaranty, constantly diminished as he pays off the loan. Thus, if a nonveteran, having made a $4,000 down payment and monthly payments reducing the principal (*i.e.*, of the $9,000 loan) by $3,000, defaulted and allowed the property to be bid in for less than $6,000, he would lose his total investment of $7,000. The veteran with an original $4,000 guaranty, on the other hand, would lose only his $3,000 in monthly payments plus $3,076 he would have to pay the VA as indemnity (the 30.76% guaranty of the original $13,000 loan applied to the reduced indebtedness of $10,000)—that is, he would be out only $6,076 rather than the $7,000 loss of his nonveteran counterpart.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX A

SERVICEMEN'S READJUSTMENT ACT OF 1944

The Act of December 28, 1945, 59 Stat. 623, 626–631, revised Title III of the Servicemen's Readjustment Act of 1944, 58 Stat. 291, to read in relevant part as follows:*

TITLE III—LOANS FOR THE PURCHASE OR CONSTRUCTION OF HOMES, FARMS, AND BUSINESS PROPERTY

CHAPTER V—GENERAL PROVISIONS FOR LOANS

SEC. 500. (a) Any person who shall have served in the active military or naval service of the United States at any time on or after September 16, 1940, and prior to the termination of the present war * * * shall be eligible for the benefits of this title. Any loan made by such veteran within ten years after the termination of the war for any of the purposes, and in compliance with the provisions, specified in this title, is automatically guaranteed by the Government by this title in an amount not exceeding fifty per centum of the loan: *Provided*, That the aggregate amount guaranteed shall not exceed $2,000 in the case of non-real-estate loans, nor $4,000 in the case of

*None of the provisions set forth were amended prior to the date of the loan in this case (January 12, 1948). With subsequent amendments having no material effect on the questions involved in this case, Title III of the Act may be found as 38 U.S.C. (1952 ed.) 694–694n. The Title was substantially rewritten by the Act of September 2, 1958, 72 Stat. 1203, and codified as 38 U.S.C. 1801–1824, and so appears in the 1958 edition of the Code.

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real-estate loans; or a prorated portion thereof on loans of both types or combination thereof.

(b) Loans guaranteed under this title shall be payable under such terms and conditions as may be agreed upon by the parties thereto, subject to the conditions and limitations of this title and the regulations issued pursuant to section 504: *Provided*, That the liability under the guaranty within the limitations of this title shall decrease or increase pro rata with any decrease or increase of the amount of the unpaid portion of the obligation: *Provided further*, * * * [interest, maturity, and security requirements omitted].

(c) An honorable discharge shall be deemed a certificate of eligibility to apply for a guaranteed loan. Any veteran who does not have a discharge certificate, or who received a discharge other than honorable, may apply to the Administrator for a certificate of eligibility. Upon making a loan as provided herein, the lender shall forthwith transmit to the Administrator a statement setting forth the full name and serial number of the veteran, amount and terms of the loan, and the legal description of the property, together with the appraisal report made by the designated appraiser. Where the loan is automatically guaranteed, the Administrator shall provide the lender with a loan guaranty certificate or other evidence of the guaranty. He shall also endorse on the veteran's discharge, or eligibility certificate, the amount and type of guaranty used, and the amount, if any, remaining. * * *

(d) Loans guaranteed hereunder may be made by any Federal land bank, national bank, State bank, private bank, building and loan association, insurance company, credit union, or mortgage and loan company, that is subject to examination and supervision by an agency of the United States or of any State or Territory, including the District of Columbia. * * *

* * * * *

PURCHASE OR CONSTRUCTION OF HOMES

SEC. 501. Any loan made to a veteran under this title, the proceeds of which are to be used for purchasing residential property or constructing a dwelling to be occupied as his home or for the purpose of making repairs, alterations, or improvements in property owned by him and occupied as his home, is automatically guaranteed if made pursuant to the provisions of this title, including the following:

(1) That the proceeds of such loan will be used for payment of the property purchased or constructed or improved;

(2) That the contemplated terms of payment required in any mortgage to be given in part payment of the purchase price or the construction cost bear a proper relation to the veteran's present and anticipated income and expenses; and that the nature and condition of the property is such as to be suitable for dwelling purposes; and

(3) That the price paid or to be paid by the veteran for such property or for the cost of construction, repairs, or alterations does not exceed the reasonable value thereof as determined by proper appraisal made by an appraiser designated by the Administrator.

* * * * *

REGULATIONS

SEC. 504. The Administrator is authorized to promulgate such rules and regulations not inconsistent with this title, as amended, as are necessary and appropriate for carrying out the provisions of this title, and may delegate to subordinate employees authority to issue certificates, or other evidence, of guaranty of loans guaranteed under the provisions of this title, and to exercise other administrative functions hereunder.

* * * * *

PROCEDURE ON DEFAULT

SEC. 506. In the event of default in the payment of any loan guaranteed under this title, the holder of the obligation shall notify the Administrator who shall thereupon pay to such holder the guaranty not in excess of the pro rata portion of the amount originally guaranteed, and shall be subrogated to the rights of the holder of the obligation to the extent of the amount paid on the guaranty: *Provided,* That prior to suit or foreclosure the holder of the obligation shall notify the Administrator of the default, and within thirty days thereafter the Administrator may, at his option, pay the holder of the obligation the unpaid balance of the obligation plus accrued interest and receive an assignment of the loan and security: *Provided further,* That (1) nothing herein shall be construed to preclude any forbearance for the benefit of the veteran as may be agreed upon by the parties to the loan and approved by the Administrator; and (2) the Administrator may establish the date, not later than the date of judgment and decree of foreclosure or sale, upon which accrual of interest or charges shall cease.

* * * * *

APPENDIX B

VETERANS' ADMINISTRATION REGULATIONS

The regulations under Title III of the Servicemen's Readjustment Act as revised by the Act of December 28, 1945, 59 Stat. 623, 626–631, are §§ 36.4300–36.4375 of the Veterans' Administration Regulations.* They were first published on March 1, 1946 (11 F.R. 2118–2126), and the provisions relevant here were amended in part on September 4, 1946 (11 F.R. 9700–9701) and December 12, 1947 (12 F.R. 8342–8346). It is in that form that they stood on the date of the loan in this case (January 12, 1948).

The regulations were republished in their entirety, with some minor amendments, on November 27, 1948 (13 F.R. 7273–7282), and were then amended in part on December 15, 1948 (13 F.R. 7739–7742). It is in that form that they stood at the date of the foreclosure and accounting proceedings in this case (May 12–July 8, 1949) and in which they appear in the 1949 edition of the Code of Federal Regulations (38 C.F.R. 36.4300–36.4375) and, with some further relatively minor amendments, in the 1956 edition.

The 1948 republication and subsequent amendments did not significantly affect the provisions of the regulations pertinent to this case, which remained substantially the same on all relevant dates and in both the 1949 and the 1956 editions of the C.F.R. For precision, however, we will set forth the regulations

* The seemingly overlapping provisions of the 36.4000–36.4200 series of the regulations relate exclusively to loans guaranteed under the 1944 Act before it was revised in 1945.

(with one exception to be noted) as they stood on the date of the loan (January 12, 1948). Unless otherwise noted, no amendments occurred between that date and the date of the foreclosure and accounting proceedings (May 12–July 8, 1949).

PART 36—REGULATIONS UNDER SERVICEMEN'S READJUSTMENT ACT OF 1944, PUBLIC LAW 346, 78TH CONGRESS [58 STAT. 284], AS AMENDED BY PUBLIC LAW 268, 79TH CONGRESS [59 STAT. 626] [11 F.R. 2118, MAR. 1, 1946.]

GUARANTY OR INSURANCE OF LOANS TO VETERANS

§ 36.4300 [12 F.R. 8342, Dec. 12, 1947] *Applicability.* The regulations in this part and amendments thereto shall be applicable to each loan entitled to an automatic guaranty, or otherwise guaranteed or insured, on or after the date of publication thereof in the FEDERAL REGISTER, and shall be applicable to such loans previously guaranteed or insured to the extent that no legal rights vested thereunder are impaired.

§ 36.4301 [11 F.R. 2118–2119, Mar. 1, 1946] *Definitions.* * * * (q) "Guaranty"—the obligation of the United States, assumed by virtue of Title III of the act, to repay a specified percentage of a loan upon the default of the primary debtor.

* * * * *

§ 36.4302 [11 F.R. 2119, Mar. 1, 1946] *Computation of guaranties or insurance credits.* (a) The sum of all guaranties * * * covering loans made to an individual veteran shall not exceed $2,000 for non-real estate loans, nor $4,000 for real estate loans * * *

(b) * * * not more than 50% of the original principal amount of any loan may be guaranteed. * * *

* * * * *

(f) A guaranty is reduced or increased pro rata with any reduction or increase in the amount of the guaranteed indebtedness, but in no event will the amount payable on a guaranty exceed the amount of the original guaranty or the percentage of the

indebtedness corresponding to that of the original guaranty.

* * * * * *

§ 36.4303 [11 F.R. 2119–2120, Mar. 1, 1946] * *Evidence of automatic guaranties; insurance advices.* (a) Evidence of automatic guaranty will be issued by the Administrator by appropriate endorsement on the note or other instrument evidencing the obligation, or by a separate certificate at the option of the lender. * * * No evidence of a guaranty or insurance will be issued on any transaction unless the lender, the veteran and the loan are shown to be eligible. An automatic guaranty must be based upon the original discharge certificate, or a certificate of eligibility issued by the Administrator, and in the event of conflicting loans, or of several loans to the same veteran, the available guaranty or insurance reserve shall be applied to the loans in the order they are reported to the Veterans' Administration.

* * * * * *

(c) [11 F.R. 9701, Sep. 4, 1946] Evidence of automatic guaranty or of insurance will be issuable if the loan is reported to the Administrator within 30 days following full disbursement, and upon the certification of the lender that:

(1) The loan has been made in full accordance with the terms and provisions of the Act,

* * * * * *

§ 36.4316 [11 F.R. 2122, Mar. 1, 1946] *Continued default.* (a) In the event any failure of the debtor to discharge his obligations under the loan continues for a period of three months, or for more than one month on an extended loar or on a term loan, the holder may at his option, then or thereafter, submit a claim for payment of the guaranty. He may also

*§ 36.4303 was revised in minor respects and reorganized—with subsections (a) and (c) becoming, respectively, (f) and (a)—on November 27, 1948 (13 F.R. 7274), and so appears in the 1949 and, with some further amendments, 1956 editions of the C.F.R.

then or thereafter give the notice prescribed in § 36.4317.

* * * * *

§ 36.4317 [12 F.R. 8344, Dec. 12, 1947] (*See also § 36.4319*) *Notice of intention to foreclose.* Except upon the express waiver of the Administrator, a holder shall not begin proceedings in court or give notice of sale under power of sale, or otherwise take steps to terminate the debtor's rights in the security until the expiration of 30 days after delivery by registered mail to the Administrator of a notice of intention to take such action: * * *

* * * * *

§ 36.4319 [12 F.R. 8344, Dec. 12, 1947] *Legal proceedings.* * * * (b) A copy of a notice of sale under power by a holder or one acting at his behest (e.g. trustee or public official) shall be similarly delivered to the Administrator at or before the date of first publication, posting, or other notice, but in any event * * * not less than 10 days prior to date of sale. * * *

* * * * *

§ 36.4320 [13 F.R. 7739–7741, Dec. 15, 1948*] *Sale of security.* (a) Upon receipt by the Administrator

* § 36.4320 was revised between the date of the loan (January 12, 1948) and the date of the foreclosure and accounting proceedings (May 12–July 8, 1949). It is set forth above as it stood on the date of the foreclosure proceedings (see note 19, pp. 36–37, *supra*). As it stood on the date of the loan, § 36.4320 read as follows:

> § 36.4320 [11 F.R. 2122–2123, Mar. 1, 1946] *Sale of security.* (a) If any security for a guaranteed or insured loan is to be disposed of through a private sale, the amount to be realized therefrom shall be reported in the notice required under § 36.4317, or by subsequent written advice at least 10 days in advance of the sale, and the Administrator may thereupon either assent to such sale, or upon agreement to indemnify the holder to the extent of any increased or resultant loss consequent thereon, may establish an upset price which shall govern in adjusting the rights and liabilities of the holder and the Administrator.
>
> (b) Upon receipt of notice of a public sale to liquidate any security for a guaranteed or insured loan the Administrator

of notice of a judicial or statutory sale, or other public sale under power of sale contained in the loan instruments, to liquidate any security for a guaranteed or insured loan, he may specify in advance of such sale the minimum amount which shall be credited to the indebtedness of the borrower on account of the value of the security to be sold, subject to the provisions of subparagraphs (1), (2), (3) and (4) of this paragraph:

(1) If a minimum amount for credit to the indebtedness has been specified in relation to a sale of real property and the holder is the successful bidder at the sale for an amount not in excess of such specified amount the holder shall credit to the indebtedness the amount so specified. The holder thereupon may retain the property or not later than 15 days after the date of sale advise the Administrator of his election to convey or transfer the property, or the rights thereto derived through the sale, to the Administrator.

* * * * *

---

may appraise such security and notify the holder in advance of the sale of the amount required to be credited to the indebtedness on account of the sale thereof, subject to the following alternatives:

(1) If a third party acquires the security at the sale the holder shall credit against the indebtedness the net proceeds of the sale, or the amount specified by the Administrator, whichever is the greater.

(2) If the holder acquires the security at the sale he shall credit the indebtedness for the purpose of accounting to the Administrator, the amount specified by the Administrator, paying over to the Administrator, the excess if any by which such credit exceeds the sum required to satisfy the indebtedness and may further dispose of the security in accordance with the rights he derived through the sale, or he may within 15 days after the date of the sale advise the Administrator of his election to transfer or convey the security, or the rights therein derived through the sale, to the Administrator in return for payment of the specified amount required to be credited to the indebtedness, or the amount required to satisfy the indebtedness, whichever is the less.

(3) Upon receiving repayment in full of all payments made on the guaranty or insurance, or upon such other

(3) If a minimum amount has been specified by the Administrator and:

(i) A third party is the successful bidder at the sale for an amount equal to or in excess of that specified, the holder shall credit to the indebtedness the net proceeds of the sale,

(ii) A third party is the successful bidder at the sale for an amount less than that speci-

---

terms as may be agreed, the Administrator shall deliver appropriate release of all rights in the property accruing by reason of the guaranty or insurance of the loan.

(c) When a debtor proposes to transfer or convey any security or other property to a holder to avoid foreclosure or other judicial, contractual, or statutory disposition or relinquishment of the obligation or of the security the consent of the Administrator to the terms of such proposal shall be obtained in advance of such transfer or conveyance. Prior to giving such consent the Administrator shall appraise the property which is to be transferred or conveyed and shall fix the amount which the holder shall be required to allow for the value of any such property in any subsequent accounting to the Administrator for a surplus resultant after payment of a guaranty, or in computing the net loss on a loan insured under section 508. The holder shall be entitled to elect to transfer or convey the property to the Administrator upon payment by the Administrator of the stated valuation up to the amount thereof required to satisfy in full the remaining balance of the indebtedness. Such election must be exercised by the holder within 15 days after receiving the transfer or conveyance of the property or he will be deemed to have elected to retain the property and to allow the required credit.

(d) If under the applicable State law, or decree of foreclosure or order of sale a minimum acceptable bid is provided, and the maximum bid for the property fails to equal such amount at the sale or if the court refuses to confirm a foreclosure sale, the creditor may submit to the Administrator a proposal for an agreement as to value of such property for purposes of a claim for guaranty, or insurance, or for accounting to the Administrator in respect of the property pursuant to §§ 36.4321(b) and 36.4321(c). The Administrator thereupon shall proceed in the manner provided in paragraph (*e*) and fix the value of the property. The value so fixed by the Administrator shall govern as between the Administrator and the creditor if the creditor elects to proceed with further sale of such property pursuant to said decree or order. If the creditor does not so elect the rights and liabilities of all parties will remain unaffected by such submission.

fied, the holder shall credit to the indebtedness the amount specified * * *

(iii) The holder is the successful bidder at the sale for an amount in excess of the specified amount the indebtedness shall be credited with the proceeds of the sale, but the holder shall not have the option provided by subparagraph (1) of this paragraph to convey the property to the Administrator unless a bid in excess of the specified amount was made pursuant to paragraph (d) of this section.

(4) If a minimum amount has not been specified by the Administrator under subparagraph (1) or (2) of this paragraph, the holder shall credit against the indebtedness the net proceeds of the sale except as provided in paragraph (d) of this section, and the provisions of subparagraph (1) of this paragraph which extend to the holder the option of conveying or transferring the property to the Administrator shall not be applicable.

(b) In the event that any real property which is security for a guaranteed or insured loan is to be acquired by a holder in a manner other than as provided in paragraph (a) or (c) of this section (e.g., by strict foreclosure or by the termination without a public sale of the purchaser's interest in a land sale contract), the holder shall notify the Administrator of the contemplated acquisition and the Administrator may specify the amount which shall be credited to the indebtedness of the borrower on account of the value of such property. If an amount is specified as aforesaid, the holder, not later than 15 days after such acquisition, may advise the Administrator of his election to convey or transfer the property to the Administrator. If an amount is not specified as aforesaid, the holder shall not have the right to such election and the amount paid or payable by the Administrator under the guaranty shall not be subject to any adjustment by reason of any future disposition of the property by the holder. * * *

(c) When a debtor proposes to convey or transfer any real property to a holder to avoid foreclosure or other judicial, contractual, or statutory disposition of the obligation or of the security, the consent of the

Administrator to the terms of such proposal shall be obtained in advance of such conveyance or transfer. In consenting thereto the Administrator may specify the amount which the holder shall be required to allow for the property in any subsequent accounting to the Administrator. In the event that the Administrator specifies an amount as aforesaid, the holder, not later than 15 days after such conveyance or transfer may advise the Administrator of his election to convey or transfer the property to the Administrator.

(d) If a minimum bid is required under applicable State law, or decree of foreclosure or order of sale, or other lawful order or decree, the holder may bid an amount not exceeding such amount legally required. If an amount has been specified by the Administrator and the holder is the successful bidder for an amount not exceeding the amount legally required, such specified amount shall govern for the purposes of this section and for the purpose of computing the ultimate loss under the guaranty or insurance. In the event no amount is specified and the holder is the successful bidder for an amount not exceeding the amount legally required, the amount paid or payable by the Administrator under the guaranty shall not be subject to any adjustment by reason of such bid.

* * * * *

(g) In the event a holder elects to convey or transfer the property to the Administrator pursuant to paragraph (a), (b) or (c) of this section, the consideration to be paid by the Administrator in return for the property shall be the specified amount: ***Provided,*** That if a claim under the guaranty was previously paid, the consideration payable for the property shall be an amount equal to the indebtedness (less the amount previously paid on the guaranty) or the specified amount, whichever is less. If no claim under the guaranty was previously paid, the holder may, pursuant to § 36:4321(b) submit a claim within the maximum guaranty liability for the difference between the specified amount and an amount equal to the indebtedness. * * *

* * * * *

§ 36.4321 [12 F.R. 8344, Dec. 12, 1947] *Computation of guaranty claims; subsequent accountings.* (a) Subject to the limitation that the total amount payable shall in no event exceed the amount originally guaranteed, the amount payable on a claim for the guaranty shall be the percentage of the loan originally guaranteed applied to the indebtedness computed as of the date of claim but not later than (1) the date of judgment or of decree of foreclosure, or (2) in nonjudicial foreclosures the date of publication of the first notice of sale, or (3) in cases in which the security is repossessed without a judgment, decree or foreclosure the date the holder reposesses the security, or (4) if no security is available or no repossession takes place, the date of claim but not more than 6 months after the first uncured default. Deposits or other credits or setoffs legally applicable to the indebtedness on the date of computation shall be applied in reduction of the indebtedness on which the claim is based. Any escrowed or earmarked funds not subject to superior claims of third persons must likewise be so applied.

(b) Credits accruing from the proceeds of a sale or other disposition of the security subsequent to the date of computation, and prior to the submission of the claim, shall be reported to the Administrator incident to such submission, and the amount payable on the claim shall in no event exceed the remaining balance of the indebtedness.

(c) The claimant shall be deemed to have received as trustee for the benefit of the United States any amounts received on account of the indebtedness after the date of the claim, from the proceeds of a sale of the security or otherwise, to the extent such credits exceed the balance of the indebtedness unsatisfied by the payment of the guaranty. He shall forthwith pay such amounts to the Administrator to the extent of the debtor's liability to the Administrator as guarantor.

(d) Any allowable expenditures or costs paid subsequent to the date of computation of the claim and before accounting to the Administrator, and accrued interest from the date of claim to the date of sale, may

be deducted by the holder from the proceeds of the sale of the security, or may be included in the accounting to the Administrator on such loan.

* * * * *

§ 36.4323 [11 F.R. 2123, Mar. 1, 1946] *Subrogation and indemnity.* (a) The Administrator shall be subrogated to the contract and the lien or other rights of the holder to the extent of any sum paid on a guaranty or on account of an insured loss, which right shall be junior to the holder's rights as against the debtor or the encumbered property until the holder shall have received the full amount payable under his contract with the debtor. No partial or complete release by a creditor shall impair the rights of the Administrator with respect to the debtor's obligation.

* * * * *

(e) Any amounts paid by the Administrator on account of the liabilities of any veteran guaranteed or insured under the provisions of the act shall constitute a debt owing to the United States by such veteran.

* * * * *

§ 36.4334 [11 F.R. 2124, Mar. 1, 1946] *Incorporation by reference.* Regulations issued under the act, and in effect on the date of any loan which is submitted and accepted or approved for a guaranty or for insurance thereunder shall govern the rights, duties and liabilities of the parties to such loan and any provisions of the loan instruments inconsistent with such regulations are hereby amended and supplemented to conform thereto.

APPENDIX C

PENNSYLVANIA DEFICIENCY JUDGMENT ACT

The Pennsylvania Deficiency Judgment Act, §§ 1–11, P.L. 400, July 16, 1941 (12 Pa. Stats. (Purdon) §§ 2621.1–2621.11) provides in part:

AN ACT to protect the debtors, obligors or guarantors of debts for which judgments are entered or may be entered, and owners of real property affected thereby, and others indirectly liable for the payment thereof, by prescribing the method of fixing the fair market value of such property sold on execution, and limiting the amount collectible thereafter on such judgments

§ 1. Whenever any real property has heretofore been or is hereafter sold, directly or indirectly, to the plaintiff in execution proceedings and the price for which such property has been sold was or is not sufficient to satisfy the amount of the judgment, interest and costs and the plaintiff seeks to collect the balance due on said judgment, interest and costs, the plaintiff or plaintiffs shall petition the court having jurisdiction to fix the fair market value of the real property sold as aforesaid. * * *

* * * * *

§ 6. At such hearings the only issue before the court shall be the fair market value of the property sold at the time of said sale * * *.

* * * * *

* * * If an answer shall be filed and testimony produced setting forth that the fair market value of the property is more than the value stated in the

petition, the court shall determine and fix the fair market value of the property which shall in no event exceed the amount of the debt, interest, costs, taxes and municipal claims.

After the hearing and the determination by the court of the fair market value of the property sold the debtor, obligor, guarantor and any other person liable directly or indirectly to the plaintiff or plaintiffs for the payment of the debt shall be released and discharged of such liability to the plaintiff to the extent of the fair market value of said property as previously agreed to by the plaintiff or plaintiffs or determined by the court, * * * and thereupon petitioner may proceed by appropriate proceedings to collect the balance of the debt.

§ 7. The plaintiff or plaintiffs shall file all petitions in accordance with section one and section two of this act not later than six months after the sale of any real property: * * * In the event no petition is filed within such period, the debtor, obligor, guarantor and any other person liable directly or indirectly to the plaintiff or plaintiffs for the payment of the debt shall be released and discharged of such liability to the plaintiff or plaintiffs.

* * * * * *

§ 9. Nothing in this act * * * shall be construed to effect a release or discharge of any person otherwise than, nor to any greater extent than as herein expressly provided.

§ 10. It shall be incompetent for any debtor, obligor or guarantor at any time, either before or after or at the time of incurring any obligation, to waive the benefits of this act or to release any obligee from compliance with the provisions thereof. Any such waiver or release shall be absolutely void, unenforceable and of no effect.

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No. 392.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

UNITED STATES OF AMERICA,
Petitioner,

v.

GEORGE E. SHIMER.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Brief for Respondent

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IN THE

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OCTOBER TERM, 1960.

UNITED STATES OF AMERICA,
Petitioner,

v.

GEORGE E. SHIMER.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE RESPONDENT.

QUESTIONS PRESENTED.

1. When Congress enacted Title III of the Servicemen's Readjustment Act of 1944, as amended, 38 U. S. C. (1952 ed.) 694-694n, and expressly provided in Section 506 thereof, that upon default and payment of the guaranty to the holder, the Administrator "shall be subrogated to the rights of the holder . . . to the extent of the amount paid", did not Congress thereby manifest an intention to bar the Administrator from recourse against the veteran after payment of the guaranty, except to the extent that the Administrator succeeded to such rights as subrogee?

2. Where a State Deficiency Judgment Act is passed to protect mortgagors and guarantors, and the holder of a mortgage guaranteed under Title III of the Servicemen's Readjustment Act fails to comply with the provisions of the State Act, the effect of which is to extinguish the debt and release the veteran-mortgagor and the Veterans' Administration as guarantor from further liability thereunder, does an enforceable right of indemnity arise in favor of the Administrator solely by virtue of voluntary payment of the guaranty to such holder?

STATUTES AND REGULATIONS INVOLVED.

Augmenting the statutes and regulations in Appendices A, B and C of the Brief of the United States, there is set forth in Appendix A of this Brief, additional regulations of the Veterans' Administration (*infra*, pp. 19, 20), and in Appendix B, an additional section of the Pennsylvania Deficiency Judgment Act (*infra*, p. 21).

STATEMENT.

This case arises from an action brought by the United States against the respondent, a veteran, to recover the amount paid to the holder of a Pennsylvania mortgage upon default by the respondent in the payment of a home loan mortgage guaranteed by the Veterans' Administration under Title III of the Servicemen's Readjustment Act of 1944, as amended, (hereinafter the Act) (Appendix A, pp. 61-64 of the Government's Brief).

The Government sought to recover from the respondent on two counts: first, as subrogee to the rights of the mortgagee-holder, and second, under an asserted independent contract of indemnity with the respondent (R. 3-5). The respondent defended on the ground that the mortgagee-holder had failed to comply with the provisions of the Pennsylvania Deficiency Judgment Act of July 16, 1941, 12 Pa. Stats. (Purdon), Sec. 2621.1 *et seq.* (Appendix C, pp. 75, 76 of Government's Brief) in that the mortgagee had failed to file a petition for deficiency within six months of the date of the judicial sale (R. 6, 7). The District Court rejected both bases of recovery and granted respondent's

Motion for Summary Judgment under Rule 56(b) (R. 8-12).

The United States appealed to the Court of Appeals for the Third Circuit from the ruling of the District Court against its claim for indemnity only. The Government did not appeal from the ruling by the District Court against its claim as subrogee to the rights of the mortgagee (R. 20, footnote 2).

The Court of Appeals, in an opinion by Circuit Judge Staley, concurred in by Chief Judge Biggs and Circuit Judge Hastie, affirmed the judgment of the District Court (R. 18-26), holding that the failure of the mortgagee to comply with the Pennsylvania Deficiency Judgment Act within the six-month period therein provided resulted in its claim against the veteran being fully satisfied by the security obtained at the judicial sale, and that the Veterans Administration as guarantor was thereby released.

Briefly, the facts as stipulated to by the parties (R. 13-16) disclose that on January 12, 1948, the respondent obtained a loan in the amount of $13,000 from the Excelsior Saving Fund and Loan Association (mortgagee-holder) to purchase a home in Pennsylvania. The Veterans' Administration, on February 11, 1948, approved an application for a loan guaranty made by the respondent, an eligible veteran under Title III of the Servicemen's Readjustment Act of 1944, as amended. The Administrator caused to be issued a loan certificate guaranteeing the loan to the extent of $4,000.00 (R. 13, 14).

On May 12, 1948, the defendant defaulted in payment on the mortgage and on June 29, 1949, the mortgage was duly foreclosed at a sheriff's sale, the property being purchased by the mortgagee for $250.00. Immediately thereafter, on July 8, 1949, the mortgagee filed a claim for payment of its loan guaranty with the Administrator of the Veterans' Administration, and on October 7, 1949, the Administrator

made payment to the mortgagee in the sum of $4,000.00. Within less than three months of the date of the judicial sale, the mortgagee resold the property to third parties for $10,500.00 (R. 14).

At no time did the mortgagee comply with the provisions of the Deficiency Judgment Act of Pennsylvania, requiring that a petition be filed within six months of the sale (R. 14); to wit, no later than December 29, 1949.

ARGUMENT

I.

THE APPLICABLE PROVISIONS OF TITLE III OF THE ACT DID NOT CREATE AN INDEPENDENT RIGHT OF INDEMNITY BETWEEN THE UNITED STATES AND THE RESPONDENT SINCE THE ACT EXPRESSLY PROVIDED THAT THE ADMINISTRATOR SHALL BE SUBROGATED TO THE RIGHTS OF THE HOLDER TO THE EXTENT OF THE PAYMENT ON THE LOAN GUARANTY.

A. *The Government concedes that the defense raised by the Respondent in this case under State Law is valid against the Administrator as Subrogee.*

Section 506 of the Act, which prescribes the procedure to be followed upon default in the payment of any guaranteed loan, provides in pertinent part as follows:

> "In the event of default in the payment of any loan guaranteed under this title, the holder of the obligation shall notify the Administrator who shall thereupon pay

> to such holder the guaranty not in excess of the pro rata portion of the amount originally guaranteed, and shall be subrogated to the rights of the holder of the obligation to the extent of the amount paid on the guaranty: *Provided . . . further*, That (1) nothing herein shall be construed to preclude any forbearance for the benefit of the veteran . . ."

The Government, in the First Count of its Complaint (R. 3) and in its Brief (pp. 23, 50) recognizes that under Section 506 "the V. A. is expressly subrogated to the bank's rights to the extent of the guaranty" (p. 23).

Section 504 of the Act authorizes the Administrator to issue rules and regulations "not inconsistent with this title", and the Administrator issued regulations governing the procedure in matters of subrogation, 38 C.F.R. (1949 ed.) 36.4323(a)(b)(c)(d).[1] (See Appendix B, p. 74 of Government's Brief and Appendix A, pp. 19, 20 of this Brief).

The Government in its Brief filed in the Court of Appeals abandoned its theory that the respondent was liable to the Administrator as subrogee of the bank's rights (p. 3, footnote 2). At page 4 of that Brief the Government said that considerations of State law:

> ". . . have point only respecting the relationship between the defendant and the bank in the first instance, or secondarily between the defendant and the bank's subrogee. We think it clear that state law control of this latter relationship can affect only those rights which the subrogee takes through the bank . . ."

---

[1] The Administrator also issued a subsection (e) to this regulation upon which the Government bases its claim to indemnity from the respondent. This regulation is not authorized by the Act and will be considered in greater detail **infra**.

It is thus clear, by the Government's own admission, that the respondent can raise all available defenses against the United States in any suit involving the Administrator as subrogee, this being in strict accord with the express provisions of Section 506 of the Act, supra.

The existence of a complete defense by the respondent, as against the holder for any deficiency on the underlying debt because of the holder's failure to comply with the provisions of the Pennsylvania Deficiency Judgment Act, would seem to signal the end of the case inasmuch as the Administrator's rights as subrogee can rise no higher than the holder's. However the Government has advanced the theory that, notwithstanding the fact that Congress in the Act failed to create or recognize the right to proceed against the veteran other than by way of subrogation, there is, *without express provision in the Act*, an independent right of indemnity which the Administrator can validly enforce against the veteran to the extent of the guaranty paid to the holder. The Government contends that this right of indemnity is a federally-created right, unaffected by any considerations of State law. The Government bases its action in this case, in the absence of specific statutory provision in Title III of the Act, upon a regulation on "indemnity", purportedly issued under Section 504 of the Act, i.e., 36.4323(e), (Appendix B, p. 74 of Government's Brief).

B. *An independent obligation of the Veteran to indemnify the United States cannot be founded upon a Regulation not authorized by the Act, or upon the Common Law of Indemnity.*

The Government in the Second Count of its Complaint (R. 4, 5) bases its alleged right of indemnity from the respondent for the amount paid the holder on the guaranty

upon Section 506 of the Act, and regulation 36.4323(e), *supra*, which provides as follows:

> "Any amounts paid by the Administrator on account of the liabilities of any veteran guaranteed or insured under the provisions of the act shall constitute a debt owing to the United States by such veteran."

It is the Government's position that this regulation creates an independent right of indemnity, and further, that it was validly issued pursuant to Section 504 of the Act. As reference to Section 504 will show (Appendix A, p. 63 of Government's Brief) the Administrator is authorized to promulgate "such rules and regulations *not inconsistent with this title* . . . as are necessary and appropriate for carrying out the provisions of this title". (Emphasis supplied.) The Government points only to Section 506 as authority in the Act for the issuance of the above regulation. It is submitted that such an interpretation of Section 506 is unwarranted.

The Government in its Brief (p. 50) admits that the "Act as in force on the date of the loan *contained no express mention* of the veteran's indemnity obligations" (Emphasis supplied.) The Government then goes on to say that this absence of legislative authorization on the subject reflects "the assumption . . . that the consequences of a guaranty (in Section 506) were so well defined by the *common law* as to require no specification." (Emphasis supplied.)

The Government for the first time in these proceedings reveals that there is in fact no statutory basis for the alleged right of indemnity which it seeks to enforce against the respondent. Under these circumstances the related regulation 36.4323(e) *supra*, must be deemed to have been issued for the purpose of carrying out the express rights of the

Administrator as subrogee of the holder, after a default and payment on the guaranty has occurred, in accordance with the mandate of Section 506 of the Act, *supra*.

In this connection it should be noted that subsection (e) of 36.4323 is included with four other subsections (a-d) all of which deal solely with subrogation. The election of the Administrator to fashion a subject heading for this regulation, "Subrogation and indemnity" is self-serving and, at all events, provides no legal basis for the creation of an alleged independent right of indemnity.

It should be noted that Section 506 by its terms is mandatory, and not directory, in declaring that the Administrator, upon guaranty payment on default, "*shall* be subrogated to the rights of the holder". (Emphasis supplied.) This express direction on the part of Congress allows no latitude or warrant for any "assumption" that the silence of Congress was indication that the "consequences of a guaranty were so well defined by the common law as to require no specification."[2] (P. 50 of Government's Brief.)

It is significant that the only support which the Government can marshal for its contention that Congress recognized an independent right of indemnity in Section 506 are amendments to Section 500(a) in 1952, and the addition of a subsection (b) to Section 506 in 1956. (See p. 51 of Government's Brief.) We are here concerned with the terms of Section 506 on the date of the loan (1948) and not with subsequent amendments to the Act.

It can thus be seen that the Government is setting up and knocking down a "straw man" when it argues that there is

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[2] Where the intention of Congress is manifest from the face of the statute (Section 506: "the Administrator . . . shall be subrogated to the rights of the holder") there is no room for construction and the courts follow the literal rule of interpretation. **2 Sutherland on Statutory Construction,** Sections 4701, 4702 (Horack's 3d ed. 1943).

present in this case a Supremacy question under Article VI of the Federal Constitution (See pp. 49, 50 of Government's Brief). As indicated heretofore, Congress has created in the Administrator rights of subrogation only, a concomitant of which is that applicable State law will govern the rights of the Administrator as subrogee. This the Government concedes.

Even if it be conceded *arguendo* that Congress intended, as the Government urges (at p. 50 of its Brief), that the common law of indemnity was recognized by Congress in Section 506 of the Act, the Government would not be entitled to indemnification in this case for the reason that when it made payment upon the guaranty to the instant holder it was under no enforceable legal obligation to do so, and hence the Administrator was a volunteer. It is well settled that a principal owes no duty of indemnity in those cases where payment is made by his surety or guarantor upon claims for which the principal is not liable.

> ". . . If the principal has a defense . . . which may be asserted by the surety, a failure by the surety to assert such defense will make his payment voluntary and deprives him of the right to indemnity, provided he had knowledge of the defense . . ."
>
> Stearns, *Law of Suretyship* (5th ed.), Section 1141 at p. 522.

As will be discussed more fully *infra*, there was no payment made by the Administrator on account of the liability of the respondent for the reason that the holder failed to comply with the provisions of the Pennsylvania Deficiency Judgment Act. Hence the Administrator was a volunteer and, under the foregoing indemnity principles, the Administrator has no enforceable right of indemnity against the veteran respondent.

Note should be made of the fact that the Government, in advancing its argument that an independent right of indemnity exists, contends that such right came into existence when the respondent executed the HOME LOAN REPORT on February 6, 1948 (R. 13, 15, 16). This is based upon the fact that at the bottom of the first page thereof (R. 15) the respondent agreed to be bound by all regulations issued under the Act and in effect on the date of the loan. The Government cannot, however, pull itself up by its bootstraps. For the reasons hereinbefore set forth, there is no provision in Title III of the Act upon which a regulation creating an indemnity relationship could be based. Hence this contention of the Government is without merit.

II.

THE PENNSYLVANIA DEFICIENCY JUDGMENT ACT RELEASES DEBTORS AND GUARANTORS FROM FURTHER LIABILITY FOR ANY DEFICIENCY ON A MORTGAGE DEBT WHERE THE MORTGAGEE AFTER FORECLOSURE FAILS TO COMPLY WITH THE PROVISIONS OF THE ACT.

A. *The Court below properly referred to the Law of Pennsylvania for computation of the guaranty claim.*

Section 506 of the Act, 38 U. S. C. (1952 ed.) 694 g,[3] entitled "Procedure on default," authorizes payment of the guaranty by the Administrator to the holder upon default. It does not provide any method for determining how the

[3] See Appendix A, p. 64 of Brief of the United States.

amount of the guaranty to be paid shall be computed.[4] Section 506 refers merely to the guaranty.

In its Brief the Government lays great stress on the need for construing Section 506 to provide an absolute, 100% guaranty payment to the lender in each and every case of default, without regard to diminution of the Administration's *liability* on the guaranty under State law, such as the Pennsylvania Deficiency Judgment Act. The Court of Appeals rejected the contention of the Government that it can recover from the veteran whatever amount it paid to the holder of the guaranteed mortgage.

Assuming that an independent right of indemnity was authorized by Section 506, the regulation upon which the Government bases its right to indemnity provides:

> "(e) Any amounts paid by the Administrator *on account of the liabilities* of any veteran guaranteed or insured under the provisions of the act shall constitute a debt owing to the United States by such veteran." (Emphasis supplied.)
>
> 38 C. F. R. (1949 ed.) 36.4323.

It is thus clear that by the Veterans' Administration's own regulations a debt of the veteran to the United States is created *only* when the Administrator makes a payment "on account of the liabilities of any veteran." The question then is whether a *liability* of the veteran existed when payment of the guaranty claim was made by the Administrator. Payment in this case having been made approximately two months *after* the foreclosure sale, was the veteran-mortgagor liable to the mortgagee for any deficiency on the underlying mortgage debt on the date of payment by the Administrator?

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[4] It does provide, of course, that payment shall not be in excess of the pro rata portion of the amount originally guaranteed.

The Court below correctly concluded that there was nothing in the Act or regulations which precluded reference to State law for determining the amount of the deficiency, if any, on the mortgage loan between mortgagor and mortgagee. In fact, the regulations make repeated references to the applicability of State law in carrying out the provisions and purposes of the Act.[5]

Regulation 36.4321 (Appendix B, p. 73 of Government's Brief) clearly indicates that reference to State law is required in this case. Sub-section (a) of this regulation provides in substance that the amount payable on a claim for the guaranty shall have:

> ". . . Deposits or other credits or setoffs legally applicable to the indebtedness on the date of computation (date of judgment or decree of foreclosure) . . . applied in reduction of the indebtedness on which the claim is based."[6]

The Court below reasoned that State law must of necessity be consulted in determining what credits or set-offs are legally applicable to the indebtedness between the mortgagor and the mortgagee on the date of foreclosure.

The Government now argues (p. 16 of its Brief) that the Court of Appeals erred in referring to State law because an existing V. A. regulation purports to govern the manner in which the credits against the claim for guaranty are computed.[7] The Government contends further (pp. 42, 43) that

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[5] See e.g., 38 C. F. R. (1949) ed.) 36.4319(a)(b)(d)(e)(f); .4320(a)(b)(d)(f)(h)(i)(j), .4321(a)-(d), .4323(a)(c)(d), .4324(a)(c)(f), .4325(b), .4327, and .4338.

[6] As noted by the Court below (R. 23, footnote 4) if any regulation be interpreted to deny the veteran the defense of partial or complete payment the regulation would be invalid as contrary to the Act.

[7] 38 C. F. R. (1949 ed.) 36.4320(a). See Appendix B, pp. 68-71 of Government's Brief.

the operation of this regulation (36.4320(a)) is in direct conflict with State law in this instance and, therefore, State law must yield under the Supremacy Clause.

The Court below was fully cognizant of regulation 36.4320(a), *supra*, as reference to the citation thereof in its opinion will show (R. 22). By clear implication the Court rejected its applicability to the case at bar, and properly so. The logical reason for this is the fact that 36.4320(a) is concerned with, and entitled, "Sale of security," while 36.4321, *supra*, involves "Computation of guaranty claims . . .", the key question in this case.

One final point remains before considering the merits of the Pennsylvania Deficiency Judgment Act. Reference to State law by Federal Courts in matters involving real estate is a well-settled practice and has been recognized by your Honorable Court on many occasions.

United States v. Brosnan, et al., 363 U. S. 237, 80 S. Ct. 1108, 4 L. Ed. 2d 1192 (1960);
Aquilino v. United States, 363 U. S. 509, 80 S. Ct. 1277, 4 L. Ed. 2d 1365 (1960);
United States v. Bess, 357 U. S. 51, 78 S. Ct. 1054, 2 L. Ed. 2d 1135 (1958).

In the *Brosnan* case, *supra*, this Court concluded that the adoption of State law was desirable, "except to the extent

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[8] Regulation 36.4320(a), **supra**, footnote 7, purports to create a procedure whereby the Administrator establishes an "upset price" which in theory is to be specified by the Administrator before the judicial sale on foreclosure occurs. It is apparent that this procedure **prior** to sale is completely unrealistic and incapable of practical application. Be that as it may, the "upset price" concept does **not** conflict with the concept of "fair market value" in the Pennsylvania Deficiency Judgment Act, **infra**. Even the Administrator has incorporated "fair market value" into the regulations. See 38 C. F. R. 36.4324(c), Appendix A of this Brief, p. 20.

that Congress may have entered the field."[9] This Court said further (363 U. S. at 241, 242):

> ". . . when Congress resorted to the use of liens, it came into an area of complex property relationships long since settled and regulated by state law . . . The need for uniformity in this instance is outweighed by the severe dislocation to local property relationships which would result from our disregarding state procedures . . ."[10]

This Court decided that it would be more consistent with Congressional intent:

> ". . . not to inject ourselves into the network of competing private property interests, by displacing well-established state procedures governing their enforcement, or superimposing on them a new federal rule." 362 U. S. at 242.

Under the foregoing authorities, the Court of Appeals was correct in referring to State law in the instant case.

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[9] As demonstrated under Part I of this Brief, **supra**, Congress had manifested no intention of entering the field in the context of this case.

[10] **Cf. Clearfield Trust Co. v. United States,** 318 U. S. 363, 63 S. Ct. 573, 87 L. Ed. 838 (1943), and cases cited at pp. 49, 50 of Government's Brief. See also Mishkin, **The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules For Decision,** 105 U. of Pa. L. Rev. 797, 828-832 (1957).

B. *Under the Pennsylvania Deficiency Judgment Act, the Respondent and the Administrator were released from all further liability by the failure of the holder to comply with the Act and the voluntary payment by the Administrator to the Holder was not on account of the liabilities of the Respondent Veteran.*

The Pennsylvania Deficiency Judgment Act (Appendix C, pp. 75-76 of Government's Brief; Appendix B, p. 21 of this Brief) provides that where the mortgagee purchases property at foreclosure, the fair market value of the property must be applied against the debt. This was recognized by the Pennsylvania Supreme Court in the case of *Sophia Wilkes Building and Loan Association v. Rudloff*, 348 Pa. 477, 35 A. 2d 278, 280, 281 (1944).

As the Court said in the *Wilkes* case, supra, at 280:

> "[T]he defendant is entitled to have the judgment against him satisfied of record, for it has been discharged as completely and effectually as if it had actually been paid off in cash."

The *Wilkes* case further emphasized the Act created a conclusive presumption that the property was worth at least one hundred per cent of the judgment.

Accord:

Union Trust Co. of New Castle v. Tutino, 353 Pa. 145, 44 A. 2d 556 (1945);
Pennsylvania Company, etc. v. Scott, 346 Pa. 13, 29 A. 2d 328 (1942).

The Pennsylvania Act also provides a method of determining fair market value. If the mortgagee considers the fair market value to be less than the debt he may have

appraisers appointed to have the amount fixed. In effect, the mortgagor is given a legal credit or set-off against the amount of indebtedness owing the mortgagee to the extent of the fair market value of the security which the mortgagee has obtained.[11] Thus, this squarely brings the present case within regulation 36.4321(a), *supra*.

On May 12, 1948, the respondent defaulted on his mortgage and on June 29, 1949, the mortgage was foreclosed at the sheriff's sale, the property being purchased by the mortgagee for $250.00. Thereafter, on July 8th, the mortgagee filed a claim for payment on its loan guaranty and on October 7th, the Administrator paid the full guaranty, to wit: $4,000.00.

Under the provisions of the Deficiency Judgment Act, the mortgagee had six months from the date of the sale (until December 29, 1949) to file a petition, and failing this the "debtor, obligor, guarantor and any other person liable directly or indirectly" to the mortgagee shall be released and discharged of such liability.[12]

By the express terms of the Act, both the respondent, as debtor, and the Administrator, as guarantor,[13] were fully released from further liability on the underlying mortgage debt when the mortgagee had failed to file the required petition on October 7, 1949, the date that the Administrator

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[11] As noted by the Court below (R. 24, footnote 6), if the property had been purchased by a third party at the sale, resulting in the receipt by the mortgagee of an amount of cash equal to or in excess of the amount of the debt, the Administrator could hardly claim that the veteran could not raise the defense of payment in full in an action brought against him on his indemnity contract.

[12] Section 7, 12 Pa. Stats. (Purdon) 2621.7 (Appendix C, p. 76 of Government's Brief).

[13] Compare **Security-First National Bank of Los Angeles v. Chapman**, 41 Cal. 2d 219, 106 P. 2d 431 (1940), where the California Deficiency Judgment Act was deemed **not** to apply to guarantors.

made payment. It is thus clear that the Administrator was on that date acting as a volunteer and under the indemnity principles set forth, *infra*,[14] the Administrator was not entitled to indemnity from the respondent.

The contentions of the Government regarding payment of the guaranty in this case leave always unanswered the central question: On what basis was the indebtedness of the respondent to the mortgagee computed so that the amount to be paid under the guaranty could be ascertained? As noted by the Court below (R. 26), until the mortgagee indicated that it was not satisfied that the fair market value of the property was equal to the indebtedness, there was no way of calculating any liability of the respondent and, in turn, any liability of the Government on its guaranty.

Failure of the lender in this case to proceed under the Pennsylvania Deficiency Judgment Act released both the veteran as debtor and the Veterans' Administration as guarantor.

CONCLUSION.

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

EDWARD DAVIS,
Attorney for Respondent.

March, 1961.

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[14] Stearns, **op cit.** at p. 10 of this Brief.

APPENDIX A

VETERANS' ADMINISTRATION REGULATIONS

Veterans' Administration Regulations 36.4323(b),(c)(d), 38 C. F. R. (1949 ed.), 36.4323(b)(c)(d), provide as follows:

"*Subrogation and indemnity.*—

* * * * * * *

"(b) The holder, upon request, shall execute, acknowledge and deliver an appropriate instrument tendered him for that purpose, evidencing any payment received from the Administrator and the Administrator's resulting right of subrogation."

"(c) The Administrator shall cause the instrument required by paragraph (b) of this section to be filed for record in the office of the recorder of deeds, or other appropriate office of the proper county, town or State, in accordance with the applicable State law. The filing or failure to file such instrument for record shall have the legal results prescribed by the applicable law of the State where the real or personal property is situated, with respect to filing or failure to so file mortgages and other lien instruments and assignments thereof.

The references herein to 'filing for record' include 'registration' or any similar transaction, by whatever name designated when title to the encumbered property has been 'registered' pursuant to a Torrens or other similar title registration system provided by law."

"(d) As a condition to paying a claim for an insured loss the Administrator may require that the loan, including any security or judgment held therefor, be assigned to the extent of such payment, and if any claim has been filed in bankruptcy, insolvency, probate, or similar proceedings such claim may likewise be required to be so assigned."

Veterans' Administration Regulation 36.4324(c), 38 C. F. R. (1949 ed.), 36.4324(c) provides as follows:

"§36.4324 *Release of security.*

* * * * * * * *

"(c) Except upon full payment of the indebtedness or upon the prior approval of the Administrator, the holder shall not release a lien under paragraphs (a) or (b) of this section unless the consideration received for the release is commensurate with the fair market value of the property released and the entire consideration is applied to the indebtedness, or if encumbrance on other property is accepted in lieu of that released it shall be the holder's duty to acquire such lien on property of substantially equal value which is reasonably capable of serving the purpose for which the property released was utilized."

APPENDIX B.

PENNSYLVANIA DEFICIENCY JUDGMENT ACT

The Deficiency Judgment Act of July 16, 1941, 12 Pa. Stats. (Purdon), Sec. 2621.1, et seq., provides in part as follows:

"§2621.7a *Proceedings when petition not filed; marking judgment satisfied:*

If the plaintiff or plaintiffs shall fail to present such petition to fix the fair market value of the real property sold within six months after the sale of such real property as provided by this act, the debtor, obligor, guarantor or any other person liable directly or indirectly to the plaintiff or plaintiffs for the payment of the debt, or any person or persons interested in any real estate which would, except for the provisions of this act, be bound by said judgment, may present his or their petition to the court having jurisdiction, setting forth the fact of said sale, and that no petition has been filed within six months after said sale to fix the fair market value of the property sold, whereupon the court, upon proof of service of at least ten days' notice of said petition on the plaintiff or plaintiffs, or their attorney in said action, and being satisfied of such facts, shall direct the prothonotary to mark said judgment satisfied, released and discharged."

SUPREME COURT OF THE UNITED STATES

No. 392.—October Term, 1960.

United States, Petitioner, v. George E. Shimer.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[June 12, 1961.]

Mr. Justice Harlan delivered the opinion of the Court.

The United States brought this action in the Eastern District of Pennsylvania to recover from Shimer, on theories of subrogation and indemnity, an amount of $4,000 which the Veterans' Administration as guarantor of a loan made to him by Excelsior Saving Fund and Loan Association, had paid to that institution.

The relevant facts, as stipulated by the parties, are these: In 1948 Shimer, a World War II veteran, borrowed $13,000 from Excelsior secured by a mortgage upon residential realty which Shimer purchased with the proceeds. At Shimer's request the Veterans' Administration, pursuant to Title III of the Servicemen's Readjustment Act of 1944 as amended in 1945 [1] granted a maximum guarantee of the loan—that is, the lesser of $4,000 or 4/13 of the indebtedness outstanding at any particular time.[2] Both

[1] 58 Stat. 291, as amended by 59 Stat. 626.

[2] "Sec. 500. (a) Any person who shall have served in the active military or naval service of the United States at any time on or after September 16, 1940, and prior to the termination of the present war . . . shall be eligible for the benefits of this title. Any loan made by such veteran within ten years after the termination of the war for any of the purposes, and in compliance with the provisions, specified in this title, is automatically guaranteed by the Government

the "Home Loan Report" signed by Shimer, and the Administration certificate of guaranty, specified that the rights of the parties would be governed by Regulations of the Administration in effect at the date of the loan and guaranty. Shimer defaulted in 1948, and in 1949 Excelsior, as mortgagee, notified the Veterans' Administration of his default and obtained a Pennsylvania judgment foreclosing the mortgage which then secured a debt in excess of $13,000.[3] After the property was purchased by Excelsior at a sheriff's sale for $250, the Veterans' Administration paid it the entire guaranty of $4,000 and brought the present action against Shimer.

In the Court of Appeals, the United States chose to rely exclusively on the Administration's alleged right of indemnity against Shimer, and accordingly does not press its claim here upon a theory of subrogation. The Court of Appeals held that the United States was not entitled to recover, reaching this result by applying a well-established principle of surety law which both parties agree was recognized by Congress when it passed Title III: The Veterans' Administration, as guarantor, could not recover from its principal, Shimer, any amount it was not obligated to pay the mortgagee, Excelsior, on his behalf.

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by this title in an amount not exceeding fifty per centum of the loan: *Provided*, That the aggregate amount guaranteed shall not exceed $4,000 in the case of real-estate loans. . . .

"(b) Loans guaranteed under this title shall be payable under such terms and conditions as may be agreed upon by the parties thereto, subject to the conditions and limitations of this title and the regulations issued pursuant to section 504: *Provided*, That the liability under the guaranty within the limitations of this title shall decrease or increase pro rata with any decrease or increase of the amount of the unpaid portion of the obligation. . . ."

[3] The computation of the amount of the unpaid debt and the amount consequently owing on the guaranty will be open for further consideration by the District Court on the remand which will result from this opinion.

Turning to state law to determine the extent of the Administration's obligation to Excelsior, the court below considered that under Pennsylvania law both Shimer and the Veterans' Administration had been released from any further liability to Excelsior at the time the Administration paid its $4,000 guarantee, that is, after the foreclosure sale. Under the Pennsylvania Deficiency Judgment Act[4] a mortgagee who purchases the mortgaged property in execution proceedings cannot recover a deficiency judgment unless and until the mortgagee obtains a court determination of the fair market value of the mortgaged property and credits that amount to the unsatisfied liability. When, as eventuated in this case, the mortgagee fails to bring a proceeding for this purpose within six months after the foreclosure sale, the debtor and guarantor are permanently discharged.

We granted certiorari, 364 U. S. 889, to pass upon the contentions of the United States that: (1) the application of state law to determine the Administration's obligation to Excelsior is inconsistent with the Regulations proscribed by the agency charged with administering the Servicemen's Readjustment Act; (2) these Regulations are authorized by the federal enactment; and (3) a right of indemnity under federal law arises in favor of the Veterans' Administration upon proper payment of its obligations as guarantor.

I.

The Regulations promulgated by the Veterans' Administration make clear that they were intended to create a uniform system for determining the Administration's obligation as guarantor, which in its operation would displace state law. Section 36.4321, 12 Fed. Reg. 8344, in

[4] Purdon's Pa. Stats., Tit. 12, §§ 2621.1–2621.11.

subsection "a" [5] implements the "pro rata" requirements of § 500 (b) of the statute, Note 2, *supra*, and establishes the procedure for computing the amount of the guaranty which the mortgagee can, under § 506 of the statute, demand to have applied against his unpaid claim on the date of default.[6] In this instance it is agreed that such amount is $4,000. However we are informed by the Solicitor General that the mortgagee is both allowed and encouraged to delay collecting on the guaranty until after all events which may lead to a government offset have taken place. The Administration's potential right as subrogee to some portion of the proceeds of a foreclosure sale is such a possible offset. Accordingly, Excelsior waited until after the foreclosure sale to collect on the guaranty. This brought Excelsior within subsection "b" of § 36.4321 which provides that "credits accruing from the proceeds of a sale . . . of the security subsequent to the date of computation [pursuant to subsection "a," *supra*] and prior to the submission of the [guaranty] claim" shall be applied in reduction of the outstanding debt and "the amount payable on the claim shall in no event exceed the remaining balance of the indebtedness."

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[5] Section 36.4321 (a) provides in relevant part:

"*Computation of guaranty claims; subsequent accountings.* (a) Subject to the limitation that the total amount payable shall in no event exceed the amount originally guaranteed, the amount payable on a claim for the guaranty shall be the percentage of the loan originally guaranteed applied to the indebtedness computed as of the date of claim but not later than (1) the date of judgment or of decree of foreclosure. . . ."

[6] Section 506 of the Act provides: "In the event of default in the payment of any loan guaranteed under this title, the holder of the obligation shall notify the Administrator who shall thereupon pay to such holder the guaranty not in excess of the pro rata portion of the amount originally guaranteed, and shall be subrogated to the rights of the holder of the obligation to the extent of the amount paid on the guaranty. . . ."

It was at this point that the Court of Appeals applied the Pennsylvania Deficiency Judgment Act to determine "the credits accruing from the proceeds of . . . [the foreclosure] sale." However, the method of determining these credits is also specified in the Regulations, indeed spelled out in § 36.4320, 13 Fed. Reg. 7739–7741, in such great detail that there can be little doubt of an administrative intent that such method should provide the exclusive procedure.[7] In substance that section provides that in every case at least the amount realized at the foreclosure sale is to be credited. It also specifies the way in which the Veterans' Administration can require the mortgagee to credit more than the amount received at the foreclosure sale and thereby protect itself against the very risk the Pennsylvania Deficiency Judgment Act was designed to alleviate—the risk of having to make good its guaranty simply because the mortgaged property is sold for an inadequate price at a judicial sale. The Administrator is authorized to "specify in advance of such sale the minimum amount which shall be credited to the indebtedness of the borrower on account of the value of the security to be sold." The mortgagee must then reduce the balance of the unpaid debt by at least

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[7] Section 36.4320 (whose length and intricacy is such as to make impracticable its spreading in this opinion) was amended in particulars not here relevant and was generally clarified between the dates of the loan and guarantee and the dates of foreclosure and sale. We consider applicable the later wording in light of § 36.4300 of the Regulation which was in effect at the date of the loan and which provided:

"*Applicability.* The regulations in this part and amendments thereto shall be applicable to each loan entitled to an automatic guaranty, or otherwise guaranteed or insured, on or after the date of publication thereof in the FEDERAL REGISTER, and *shall be applicable to such loans previously guaranteed or insured to the extent that no legal rights vested thereunder are impaired.*" (Emphasis added.)

this minimum amount before collecting on the guaranty. The mortgagee has the option, however, of selling any property it purchased at or below this minimum amount to the Veterans' Administration for the specified minimum amount. If, as in the present case, the Administrator does not specify a minimum amount "the holder [mortgagee] shall credit against the indebtedness the net proceeds of the sale . . . ."

In effect, then, the scheme set up by the Regulations provides the Veterans' Administration with a measure of assurance that there shall be credited against the unpaid debt at least what the Administrator regards as the fair value of the mortgaged property. In terms of the present case: With an unpaid balance of indebtedness of $13,000, the Veterans' Administration should not have to pay its full guaranty of $4,000 unless the property which Excelsior may retain is worth less than $9,000. If Excelsior purchased property worth $10,000 for $250 at the foreclosure sale, the Administration should not have to pay more than $3,000 on its $4,000 guaranty, or, to state the matter more precisely, the Administration should realize a $1,000 credit as set off against its $4,000 guaranty which Excelsior could have claimed at the time of default. Accordingly, if the Administrator regarded the mortgaged property as worth $10,000 he could have specified (which he did not) a minimum credit (or "upset price") of that amount which Excelsior would then have had to credit against the $13,000 unpaid debt. If Excelsior had purchased the property for $10,000 or less, it would have had an option to reconvey the property at a valuation of $10,000 to the Veterans' Administration.

This scheme of protection, while intended to remedy the same abuses at which the Pennsylvania Deficiency Judgment Act is directed, is, of course, inconsistent with the Pennsylvania procedures which provide for a judicial

determination of the amount to be credited against an outstanding debt and do not obligate the guarantor to purchase the mortgaged property at its judicially determined value. We have no doubt that this regulatory scheme, complete as it is in every detail, was intended to provide the whole and exclusive source of protection of the interests of the Veterans' Administration as guarantor and was, to this extent, meant to displace inconsistent state law.[8]

II.

We think that the Servicemen's Readjustment Act authorized the Veterans' Administrator to displace state law by establishing these exclusive procedures.[9] In this regard it is important to recall the scope of our review in a case such as this. More than a half-century ago this

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[8] This conclusion is fortified by § 36.4320 (d) which specifically excludes and waives one type of state protection of guarantors and lenders which otherwise would have seemed to fit the other provisions of the section. Subdivision (d) provides:

"If a minimum bid is required under applicable State law, or decree of foreclosure or order of sale, or other lawful order or decree, the holder may bid an amount not exceeding such amount legally required. If an amount has been specified by the Administrator and the holder is the successful bidder for an amount not exceeding the amount legally required, such specified amount shall govern for the purposes of this section and for the purpose of computing the ultimate loss under the guaranty or insurance. In the event no amount is specified and the holder is the successful bidder for an amount not exceeding the amount legally required, the amount paid or payable by the Administrator under the guaranty shall not be subject to any adjustment by reason of such bid."

[9] Section 504 of the Act provides: "The Administrator is authorized to promulgate such rules and regulations not inconsistent with this title, as amended, as are necessary and appropriate for carrying out the provisions of this title, and may delegate to subordinate employees authority to issue certificates, or other evidence, of guaranty of loans guaranteed under the provisions of this title, and to exercise other administrative functions hereunder."

Court declared "that where Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involves questions of law or fact, will not be reviewed by the courts, unless he has exceeded his authority or this court should be of the opinion that his action was clearly wrong." *Bates & Guild Co.* v. *Payne*, 194 U. S. 106, 108–109. This admonition has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations. See, *e. g.*, *National Broadcasting Co.* v. *United States*, 319 U. S. 190; *Labor Board* v. *Hearst Publications, Inc.*, 322 U. S. 111; *Republic Aviation Corp.* v. *Labor Board*, 324 U. S. 793; *Securities & Exchange Comm'n* v. *Chenery Corp.*, 332 U. S. 194; *Labor Board* v. *Seven-Up Bottling Co.*, 344 U. S. 344.

In the present case we need only consider the statutory authorization for § 36.4320 (a)(4) which provides that "If a minimum amount [the upset price] has not been specified by the Administrator . . . the holder shall credit against the indebtedness the net proceeds of the sale. . . ." It would, of course, have been possible for the Administrator to have promulgated regulations consistent with much of the present scheme which would have, in addition, accepted the benefits of local law which tended further to reduce a guarantor's risk of loss from sale of the mortgaged property at an inadequate price. Thus, with specific reference to the Pennsylvania Deficiency Judgment Act, there would have been nothing inherently illogical about administrative regulations providing for an "upset price" device and then adding that, in situations where the "upset price" technique was not

used by the Administrator, the Veterans' Administration was to be entitled to the benefits of the state judicial assessment of the value of property purchased by the mortgagee. However, the Veterans' Administrator has chosen not to take advantage of laws like that of Pennsylvania. If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.

It is doubtless true that the policy of the Act is, broadly stated, to enable veterans to obtain loans and to obtain them with the least risk of loss upon foreclosure, to both veteran and the Veterans' Administration as guarantor of the veteran's indebtedness, and it is equally clear that had the Regulations adopted or included the provisions of the Pennsylvania Deficiency Judgment Act this would have furthered at least the second of these purposes. However, there are also ample indications both in the Act and in its legislative history that Congress intended the guaranty provisions to operate as the substantial equivalent of a down payment in the same amount by the veteran on the purchase price, in order to induce prospective mortgagee-creditors to provide 100% financing for a veteran's home.[10] The Regulations which the Administrator has adopted provide what the agency could allowably view as a more effective reconciliation of these two-fold ends than might be accomplished by a complete or partial adoption of the law of a State such as Pennsylvania.

[10] See, *e. g.*, H. R. Rep. No. 1418, 78th Cong., 2d Sess., pp. 3, 9; Hearings before Subcommittee of the Senate Committee on Finance on H. R. 3749, 79th Cong., 1st Sess., pp. 31–33 (General Omar Bradley).

The Regulations assure a Pennsylanvia mortgagee-creditor that he will be able either to recover the full amount of the guaranty or to sell the mortgaged property to the United States and recover the amount of its loss after such sale. For example, in the present situation Excelsior knew that it could either recover $4,000 from the Veterans' Administration and keep the mortgaged property, or that it could sell the mortgaged property to the United States, recovering on its guaranty the amount by which the unpaid debt exceeded the price which the United States had paid. The only risk of loss with which Excelsior would have been faced was the risk of having on its hands a property worth less than $9,000 to secure a residual debt of $9,000 (after the United States had paid $4,000 of the total debt of $13,000). This is precisely the risk which Excelsior would have had to assume had it insisted upon a $4,000 down payment by the veteran and lent $9,000 on the property. Presumably therefore it was willing to accept a $4,000 guarantee under the Administrator's Regulation in exchange for a $4,000 down payment.

In contrast, a mortagagee whose federal guaranty was subject to the law of a state such as Pennsylvania would be subjected both to an additional cost and to an additional risk, neither of which is present when there is an equivalent down payment. The additional cost is that required in every case to litigate the value of the mortgaged property. The additional risk is that, if it was judicially determined that the property was worth more than the amount for which the mortgagee could in fact sell it, the mortgagee would have to absorb the cost of the judicial error and could recover on its guaranty only the difference between the unpaid debt and the amount of the judicial estimate of the value of the property. Thus if the value of the mortgaged property in the present case had been judicially assessed at $10,000, Excelsior, after

payment of the resulting $3,000 on the guaranty, would have been left with the mortgaged property in place of an unrequited $10,000 loan, whereas had it insisted on a $4,000 down payment from the veteran it would have had the mortgaged property to stand for a $9,000 loan.[11]

We cannot say that a Pennsylvania lender would not prefer a down payment to a guaranteed loan in the same amount if the Pennsylvania Deficiency Judgment Act were applicable. Nor can we say that the Administrator has unreasonably sacrificed either the Government's or the veteran's protection in relying exclusively on the "upset price" device in order to preserve the interchangeability of a guaranty with a down payment. The Veterans' Administration can and does protect itself from a sale at an inadequate price by specifying the minimum credit which the mortgagee must subtract from the unpaid debt. In protecting itself it also places its own financial resources behind the debtor-veteran who may be forced to reimburse the Administrator only if the Administrator considers that the property has been sold at a fair price, and who retains all the benefits of state law as against the mortgagee.

We consider the Regulations to be a reasonable accommodation of the statutory ends; first, of making a federal guaranty the substantial equivalent of a down payment; and, second, of protecting both the Veterans' Administration and the veteran from unnecessary loss on a foreclosure sale. And since we find nothing in the statute or the legislative history antagonistic to this accommodation, we hold the Regulations to be a valid exercise of the authority granted the Administrator in § 504 of the Servicemen's Readjustment Act (Note 9, *supra*).

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[11] Pennsylvania law does not require a mortgagee who purchases the mortgaged property at a foreclosure sale for an amount less than the unpaid debt to return any portion of the down payment pursuant to a judicial assessment of the value of the property.

III.

Respondent's final contention is that even though the Veterans' Administration was obligated on its guaranty to Excelsior, the Administration nevertheless had no right to indemnity from him. It is argued, first, that under the Act the Administration, in circumstances like these, can recover over against the veteran only on a theory of subrogation to the mortgagee's rights. The Administrator having proceeded in this instance simply on a theory of indemnity, it is claimed that there is no statutory authorization for the present suit.

The Act, prior to its amendment in 1945, had no explicit provision controlling either the time of payment of the Administration's guaranty or its right to recover over against the veteran. It was assumed that the ordinary concomitants of a guaranty relationship would follow upon the mere authorization of government guaranteed loans and that these included the guarantor's right of indemnity. Restatement of the Law of Security § 104; Decisions of the Administrator of Veterans' Affairs, No. 625, Vol. 1, p. 1154. The 1945 amendments made explicit that payment of the guaranty would be due on the veteran's default and that thereupon the Administrator "shall be subrogated to the rights of the holder of the obligation to the extent of the amount paid on the guaranty."

It is argued that this amendment, by negative implication, overruled or rejected what the Administrator had previously regarded as his independent right to indemnity, but surely this is carrying a negative implication too far. We cannot agree that Congress, without any statutory reference to the problem and without any discussion of it, intended to relieve the veteran of direct liability for amounts properly paid on his behalf by the Veterans' Administration. Not only might such a waiver of a

guarantor's normal rights require a more burdensome route to recovery over from the principal, but it would deprive the guarantor of any recovery on occasions when the mortgagee's rights were limited as against the debtor by state law, yet were protected against the Administrator by state or federal law. Relief from liability in these circumstances would convert a guaranty into a grant of aid. But the entire history of the "home loan" provisions of the statute is inconsistent with an intent to make outright grants, rather than loans of cash (S. 1767, 78th Cong.) or credit, to returning servicemen.

Moreover, the recognition of a loss to the guarantor merely because of a failure of the lender's rights against the principal is incompatible with the background of general surety law against which the statute was drawn. See, *e. g.*, *Leslie* v. *Compton*, 172 P. 1015. Indeed, at the time of the 1945 amendments to the Act the Administrator had already ruled that there was a right to recover over against the veteran on a theory of indemnity in situations where recovery by way of subrogation was barred by state law. Decisions of the Administrator of Veterans' Affairs, No. 625, Vol. 1, p. 1154.

For these reasons, we are constrained to agree with the uniform construction of the lower courts, including that of the two courts below, that the statute affords an independent right of indemnity to the Veterans' Administration. See *United States* v. *Shimer*, 276 F. 2d 792; *McKnight* v. *United States*, 259 F. 2d 540; *United States* v. *Jones*, 155 F. Supp. 52; *United States* v. *Gallardo*, 154 F. Supp. 373; *United States* v. *Henderson*, 121 F. Supp. 343.

Finally, we find untenable respondent's argument that the applicable Regulation does not support recovery because there was no debt due *from the veteran* at the time of payment on the guaranty. Section 36.4323 (e) 11 Fed. Reg. 2123, provides: "Any amounts paid by the Administrator on account of the liabilities of any veteran

guaranteed or insured under the provisions of the act shall constitute a debt owing to the United States by such veteran." The Regulation is merely declaratory of a surety's customary right of indemnity for amounts paid pursuant to an obligation of the guarantor assumed with the consent of the principal. Restatement of the Law of Security § 104. This right is in general unaffected by defenses of the principal which are not available to the guarantor.[12] Simpson, Suretyship, at p. 227; Stearns, Law of Suretyship, § 284. The Regulation certainly indicates no purpose to depart from the general rule in the case of guaranties by the Veterans' Administration.[13]

The judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS would affirm the judgment for the reasons stated by the Court of Appeals, 276 F. 2d 792.

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[12] Moreover, at the time the Veterans' Administration became liable on its guaranty (*i. e.*, on the veteran's default and prior to the foreclosure sale, see Notes 5 and 6, *supra*) the Administration and the respondent veteran had no defenses to payment either under state law or under the Regulations of the Administrator.

[13] This is made particularly clear by the form of the Regulation which was the predecessor of 11 Fed. Reg. 2123. The earlier Regulation, 9 Fed. Reg. 12655, provided:

"(a) Any amounts paid to the creditor by the Administrator pursuant to the guaranty shall constitute a debt due to the United States by the veteran on whose application the guaranty was made. . . ."